R.V. Kelkar's

Criminal

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General Editor

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R.V. Kelkar's

CRIMINAL PROCEDURE

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Foreword

Man may be a little lower than, the angels, he has not shed off the brute and the brute within is apt to break loose on occasions. Such aberrations m human, behaviour result in crime. Crime, however, has acquired today wide dimensions, both, in its enormity and variety. Mens rea was at one time considered to be an essential ingredient of every offence. The position has somewhat changed and there are various offences of which mens rea is not an. ingredient.

To deal with the perpetrators of crime, we need law courts. We also need a code prescribing the procedure to be followed in the law courts. Not all people who are sent up for trial are guilty of the offences with which they are charged. Duty therefore has been cast upon, the courts of deciding as to whether the person charged with, an offence has actually been proved guilty. The procedure which governs the court proceedings before it arrives at that conclusion has to be such as is fair, inspires confidence and at the same time is not such as provides a wide escape route for the guilty.

The Criminal Procedure Code, as observed in *Iqbal Ismail So daw ala* v. *State of Maharashtra* [(1975) 3 SCO 140] is essentially a code of procedure and like ail procedural law, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. At the same time it has to be borne in. mind that it is procedure that spells much of the difference between rule of law and rule by whim and caprice. The object of the Code is to ensure for the accused a full and fair trial in. accordance with, the principles of natural justice.

Mr Kelkar has brought a fresh approach in this book while dealing with, the subject of criminal procedure. There is topicwise arrangement of the subject-matter and analysis of the relevant sections connected with each topic. *1* am sure the book would prove useful to all those interested in criminal procedure.

May 7, 1977 H.R. Khanna

Preface to the Sixth Edition

It is with a sense of satisfaction that the sixth edition of R.V. *Kelkar's Criminal Procedure* is presented to the students to whom the book was dedicated by the illustrious author, late Prof. R.V. Kelkar. *I* had the fortune to study criminal procedure law under him. It was his command that I should revise his book.

Prof. Kelkar was the first to come out with a book on criminal procedure with topic-wise treatment. This mode of dealing with issues in criminal procedure law has indeed revolutionised law teaching and research in India.

M/s Eastern Book Company shares the glory of this achievement. Their concern to keep the book to be relevant for law teaching and within the reach of the students made it possible to bring out the present edition with some innovations which are student-friendly.

The space provided in the margin may help the students to make notes on important developments of current importance. The points for discussion given at the end of the book might ignite the imagination of students who are interested to do research in criminal procedure law.

I am grateful to my student, Dr Balakrishnan, Associate Professor, National University of Advanced Legal Studies, Cochin for all help rendered in updating the material.

Here is the product of our labour. I stand beholden to my teacher. I am indebted to Shri Surendra Malik of M/s Eastern Book Company for his active support and appreciation.

Cochin
April 15, 2014

—Dr K.N. Chandrasekharan Pillai

Preface to the First Edition

A fairly good grasp of criminal procedure is obviously essential for the prosecutors, defence lawyers, magistrates and other senior judges dealing with criminal matters. Where and how do they learn this law? Most of them would probably say that they *really* learnt the procedural law only after completing their formal legal education at the colleges and universities. Very few of them, if at all, w[r]ould be able to acknowledge that they could get adequate grounding in the basic principles of criminal procedure before leaving the portals of academic institutions.

The Bar Council of India rightly requires that criminal procedure should be one of the compulsory subjects to be included in the syllabi for the degree course in law. It has been so included by all the universities. However very few full-time law teachers have been teaching criminal procedure. The part-time law* teachers do not simply have the necessary time to develop the academic study including its teaching methods. The procedural laws have not been as yet considered to be good fields for specialisation at the LLM level, and are mostly neglected. The leaders in the field of legal education, with few honourable exceptions, hardly take any serious interest in the study and development of procedural laws. This might just be a fortuitous situation, but it is there. Many socio-legal research areas in the field of criminal law have remained untapped; others have been handled not quite effectively. One important reason for this unfortunate situation is the lack of adequate background study of criminal procedure on the part of those who undertake, or who are expected to undertake, such research studies. In a changing society, the criminal procedure by its very nature would need frequent changes to keep pace with the times and also to reflect in it the changing values and moods of the people. The contribution of the academic community in this field of law reforms and legislation is unfortunately far from impressive. All this cannot be changed

overnight. Patient efforts consistently made over a period of years may change this dismal picture.

The neglect and indifference in the study of criminal procedure are both the cause and the consequence of the dearth of *suitable* reading materials in the field. No doubt there are several books on the Criminal Procedure Code giving sectionwise commentaries. These works—and some of them are quite impressive—are useful in their own way. They are of great assistance to the busy practitioners in their daily chores. However, these books are less suited to those who want to study the basic fundamental principles of criminal procedure in a logical sequence. The present arrangement of the sections of the Criminal Procedure Code has not been specially designed to subserve the needs of the students. Experience has shown that the section wise commentary is not quite effective and efficient medium for class-room instruction. It fails to evoke adequate interest in the subject and falls short of focussing enough attention on the basic fundamental principles and also on the interaction of the different sections through which the principles become operative.

The topic-wise organisation of the subject of criminal procedure has better chances of success in imparting knowledge of the provisions and also developing insight into the subject. Needless to say that such arrangement of the subject-matter would certainly give an important place to the study of the judicial experience in the actual working of the Criminal Procedure Code. Therefore, the topicwise arrangement of the subject- matter, the analysis of the relevant sections connected with each topic, and the critical appraisal of such sections in the light of judicial decisions, should form the hard core of the reading materials on criminal procedure. That alone, It is humbly submitted, would make the study of criminal procedure both meaningful and interesting. There are hardly any books on criminal procedure which evince such a treatment. Even the books primarily written for students do not have the abovesaid features in adequate measure and mostly follow the traditional section wise pattern. Hence the Outlines of Criminal Procedure has been conceived to fill the gap. It is an attempt to provide a new type of book on criminal procedure, and it is hoped that the students and teachers would welcome this experiment.

The author is quite conscious of his shortcomings; and after completion of the book he did feel that a better arrangement could have been made In the organisation of the subject-matter. But by then it was too late to recast the mould. The author hope to improve upon his efforts in the next edition of the book.

Readers may kindly note that the following abbreviations have been used in the book for the sake of convenience:

41st Report	Forty-first Report of the Law Commission of India on the Code of Criminal Procedure, 1898, Part I (1969)

37th Report	Thirty-seventh Report of the Law Commission of India on the Code of Criminal Procedure, 1898 (1967)
14th Report	Fourteenth Report of the Law Commission of India on Reform of Judicial Administration (1958)
Statement of Objects and Reasons	Statement of Objects and Reasons appended to the Code of Criminal Procedure Bill, 1970 as introduced in the Rajya Sabha.
Notes on Clauses	Notes on clauses appended to the Code of Criminal Procedure Bill, 1970 as introduced in the Rajya Sabha.
Joint Committee Report	Report of the Joint Committee on the Code of Criminal Procedure Bill, 1970 (1972)
Report of the Expert Committee on Legal Aid	Report of the Expert Committee on Legal Aid—Processual Justice to the People (1973}
IPC	The Indian Penal Code, i860.

The sections referred to in the text of the book, unless otherwise indicated, pertain to the Criminal Procedure Code, 1973.

Readers may also note that judicial decisions under the provisions of the Criminal Procedure Code, 1898, have been cited where the new provisions of the Criminal Procedure Code, 1973 are similar to those of the old Code of 1898. Reference to such cases would be useful in understanding as to how the provisions of the new Code of 1973 are likely to be interpreted by the courts.

I take this opportunity to express once again my sincere thanks to the publishers for the patience with which they waited — and they waited for long—for the completion of the book. I am thankful to all those who directly or indirectly rendered assistance to me in the preparation of the book.

New Delhi
May 3, 1977

— R.V. Kelkar

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Prologue

Indian Criminal Procedure Code contains provisions to ensure protection of civil liberties. These protections have been incorporated as part of criminal procedure law even before the enactment of the Indian Constitution. Principles of legality, presumption of innocence, etc. which are part of the Constitution were already there as part of the criminal procedure law. However, there is a tendency of the courts to look upon the provisions as part of a statutory scheme. For example, the requirement of producing the arrested person within 24 hours of arrest before a Magistrate as a requirement of complying with Section 57 CrPC is looked upon as a statutory requirement rather than as the constitutional requirement of protecting the individual from arrest. The principles underlying this provision are not adverted to at theoretical level. This attitude is writ large in the whole spectrum of criminal procedure. Some instances of importance may be captured for the purpose of showing the development of procedural law in India.

Sometimes certain practices and terms followed by the functionaries for a long time continue camouflaging the idea behind the practices. For example, the police challan under Section 173 is being referred to as charge-sheet whereas under the law charging has to be done by the court after considering the police challan. The purpose of charging *viz.* giving a notice to the accused of the allegations he has to face in the trial, is not frequently mentioned.

At times, even when it is admitted that the procedural law should accept certain rights having regard to the constitutional provisions, do not fully support raising them to the level of independent rights that can be claimed by the citizens. For example, the right to speedy trial or the right to counsel at investigation stage or appellate stage might be looked into. Though speedy trial right is acknowledged to be part of Article 2.1

of our Constitution, it is not enforced in every case where trial has been delayed. Its enforcement is selective. Right to counsel at investigation stage is indeed a right but non-compliance with the provisions laying down the right does not vitiate the trial, though the Magistrate who failed to communicate the availability of this right may have to face disciplinary proceedings.[1] [2] [3] [4] This right may not be available as part of constitutional law. But a limited version as part of *D.K. Basu* v. *State of W.BA* might be available to the accused. The necessity for bringing out this position is incomprehensible though.[5] Though in *Mobd. Sukur Ali* v. *State of Assam** the Supreme Court upheld the right to counsel at appellate stage, in *K.S. Pandimmga* v. *State of Karnataka*[5] the court said that there is no such a right though the appellate court is required to hear the appeal on merits as a rule.

The requirement of registering FIR has also been examined by the court. Though in the case of cognizable offences it has been ruled to be compulsory, the court carved out some areas where its main rule may not be applicable. If the court was to strictly follow the theory that the court alone has the power to determine the suitability of information for registration, it should have stuck with it. Instead, the court carved out exception having regard to the realities of the situation. The fact remains that access to justice becomes meaningful if only this stage is overseen by the Magistrate.[6]

It has always been the view of the courts that investigation is the prerogative of the police. It is not understood why the judiciary has been insisting on this position when it knew that right from the FIR stage till the completion of investigation it is the Magistrate who is the pivot of the machinery. Indeed, it is a positive development that our courts now look upon investigation as part of complainant's constitutional right and the Magistrate having the primordial position in investigation. In fact if one looks at the theoretical basis of investigation it becomes clear that the position of Magistrate-an independent and Impartial officer-should be important as it is for him to decide whether the investigation report has allegations of commission of crimes to be tried by himself or by the higher formation of district judiciary. The approach of the Supreme Court in examining the summoning power has also not been made in the context of the theory of supremacy of the court in such matters. If the supremacy of the court is accepted any information from anywhere signifying the involvement of any person in any crime, could be summoned by the court

1. See, observations in *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra,* {2.012.) 9 SCC
2. { £997} 1 SCC 416.
3. See, *Directorate ofRevenue Intelligence v. Jugal Kish ore Samra,* (2.011) 12 SCC 362.
4. {2011) 4 SCC 729: {201 £) 2 SCC (Cri) 481.
5. (2013} 3 SCC 721.
6. See discussions in *Lalita Kumari* v. *Govt. ofU.P.,* {2014) 2 SCC 1.

on its own. Now in *Dbaram Pal* v. *State of Haryana*[7][8] and *Hardeep Singh* v. *State of Punjab** it has been ruled by the Supreme Court that if a person has not been included in the police report but he is shown to have participated in the crime, the court under Sections 193 and 3x9 CrPC could order him to be included as accused. It need not be the "evidence"[1] after cross-examination to act on Section 319. The court if it gets adequate material during inquiry also, according to *Hardeep Singh,* it can summon additional accused.

One cannot be found fault with if one has the feeling that the court instead of relying on the language of various sections could have advanced the theory that it is the satisfaction of the court about the prima facie case against the individual which should matter.

It may also be of interest to see that once a trend is set in by the Supreme Court it may have its repercussion in the criminal jurisprudence. The Supreme Court in *Mahesh Chand* v. *State of Rajasthan*[9][10] compounded the non-compoundable offence under Section 307 IPC. This position was received by the High Courts differently.[50] Some High Courts started compounding the non-compoundable offence under Section 498-A if the parties have compromised their dispute. In 2003 in *B,S. Joshi* v. *State of Haryana*[11] the Supreme Court accepted this position. Still its reasoning was doubted by a different Bench of the Supreme Court. Only in 2012 in *Gian Singh* v. *State of Punjab* [11][12]*the* ratiocination in *Joshi* came to be upheld.

The Supreme Court is yet to develop a sentencing policy on the basis of different theories of punishment *viz.* retribution, deterrence, reformation or prevention. Indeed, rehabilitation and proportionality are mentioned in some decisions but there is no discussion on them with a view to structure a sentencing policy. As a matter of fact the case law produced by the Supreme Court on death penalty does not signify any effort at theorisation.

If one examines the Supreme Court's view on commutation and remission or even mercy power it becomes clear that it has no vision on these. Earlier it was thought that it is an executive power and the court should not interfere. Later it is asserted that the court has the power to avoid remission being granted to the convicts. What is the basis on which this view is evolved? Is it not executive/legislative power to decide commutation/ remission?

It seems that the Supreme Court quite often has to act as a court of appeal. This trend results in backlog leading to delay.

It will do good if these trends are noted and acted upon by the courts and the legislature.

7. (1014) 5 SCO 306: AIR 1013 SC 3018.
8. (2014) 3 SCO 92.
9. 1990 Supp SCC 681: AIR 1988 SC 2.1 n.
10. Sec discussion in *Gursharan Kaur* v. *State of Rajasthan,* 1993 Cri Lj 2076 (Raj).
11. {2003} 4 SCC 6~y. *Rain Lai* v. *State o f J & K ,* 1999 SCC (Cri) 123.
12. (2012) 10 SCC 303,

Chapter t

Object, Extent and Scope

Purpose of criminal procedure 1.1

The essential object of criminal law is to protect society against criminals and lawbreakers. For this purpose the law holds out threats of punishments to prospective lawbreakers as well as attempts to make the actual offenders suffer the prescribed punishments for their crimes. Therefore, criminal law, in its wider sense, consists of both the substantive criminal law and the procedural (or adjective) criminal law. Substantive criminal law defines offences and prescribes punishments for the same, while the procedural criminal law is to administer the substantive law.

The Penal Code, 1S60 (IPC), together with the other penal laws like the Prevention of Food Adulteration Act, Protection of Civil Rights Act, Dowry Prohibition Act, etc., constitute our substantive criminal law. Obviously, this substantive criminal law by its very nature, cannot be selfoperative. A person committing an offence is not automatically stigmatised and punished; nor would the offender be, generally speaking, interested in confessing his guilt and receiving the sentence. It is for this reason that the procedural criminal law has been designed to look after the process of the administration and enforcement of the substantive criminal law. In the absence of procedural law, the substantive criminal law would be almost worthless. Because, without the enforcement mechanism, the threat of punishment held out to the lawbreakers by the substantive criminal law would remain empty in practice. Empty threats do not deter, and without deterrent effect, the law of crimes will have hardly any meaning or justification. If "thieves" and "murderers" are not detected, prosecuted, and punished, what is the use of meticulously defining the offences of "theft" and "murder" and prescribing "deterrent" punishments for them.

Our law[r] of criminal procedure is mainly contained in the Criminal Procedure Code, 1973 (CrPC) which has come into force from 1 April

1974. It provides the machinery for the detection of crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or innocence of the suspected person, and the imposition of suitable punishment on the guilty person. In addition, the Code also deals with prevention of offences; [Ss. 106-24, 129-32, and 144-53] maintenance of wives, children and parents; [Ss. 125-28] and public nuisances. [Ss. 133-43]

The CrPC also controls and regulates the working of the machinery set up for the investigation and trial of offences. On the one hand it has to give adequately wide powers to make the investigative and adjudicatory processes strong, effective and efficient, and on the other hand, it has to take precautions against errors of judgment and human failures and to provide safeguards against probable abuse of powers by the police or judicial officers. This often involves "a nice balancing of conflicting considerations, a delicate weighing of opposing claims clamouring for recognition, and the extremely difficult task of deciding which of them should predominate".[1]

1.2 Special importance of criminal procedure

The basic importance of criminal procedure has to be borne in mind, as it is the procedure that spells much of the difference between rule of law and rule by whim and caprice.[2] In addition, the importance of a Criminal Procedure Code is based on three other special considerations:[3] [4]

(/} It is more constantly used and affects a greater number of persons than any other law.

{H) The nature of its subject-matter is such that human values are involved in it to a greater degree than in other laws.

{Hi) As the law of criminal procedure is complementary of the substantive criminal law, its failure would seriously affect the substantive criminal law which in turn would considerably affect the protection that it gives to society. Therefore it has been rightly said that too much expense, delay and uncertainty in applying the law of criminal procedure would render even the best penal laws useless and oppressive.

1.3 Basic considerations in the formulation of the Code of 1973

While formulating the CrPC, the following considerations were therefore kept in view:

1. 37th Report, p. *j* .
2. *Iqbal Ismail Sodawala* v. *State of Maharashtra,* (1975) 3 SCO 140: 1974 SCO (Cri) 764, 770:
3. *See,* 37th Report, pp. 1—a,.
4. Statement of Objects and Reasons, para. 3; *also see,* observations of the Kerala High Court in *Ragbarn Nadar Reghu* v. *State,* 1988 Cri LJ 1364 (Ker), 1373.

(/) an accused person should get a fair trial in accordance with the accepted principles of natural justice;

{ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and

{in) the procedure should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.

Territorial extent 1.4

The CrPC extends to the whole of India except the State of Jammu and Kashmir and some tribal areas. This has been provided by sub-section (2) of Section 1 as follows:

1. {2) It extends to the whole of India except the State of Jammu and Kashmiig/j^t *titl*$_{e}$ *extent* Provided that the provisions of this Code, other than those relating to *an*$_{d}$ *commencement* Chapters VIII, X and XI thereof, shall not apply—

(a) to the State of Nagaland,

{b} to the tribal areas,

but the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification.

Explanation.—In this section, "tribal areas" means the territories which immediately before the 21st day of January 1972, were included in the tribal areas of Assam, as referred to in Paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong.

Considering the social conditions prevailing in the State of Nagaland and the tribal areas mentioned above, it has not been considered desirable, at least for the time being, to extend to these areas the sophisticated provisions of the CrPC. These territories are having their own simple rules for the administration of criminal justice. Moreover the provisions of the Code relating to Chapters VIII {Security for keeping the peace and for good behaviour), X (Maintenance of public order and tranquillity), XI (Preventive action of the police) have been made applicable to the State of Nagaland and the tribal areas. Further, the concerned State Government has been empowered to apply any or all of the provisions of the Code to any part of the State or such tribal area. According to the Supreme Court, since the Code is not in force in these areas, the procedure to be followed is according to the spirit of the Code and not strictly according to the terms of its provisions.

The Supreme Court has reiterated that the inapplicability of the provisions of the CrPC in the above areas is of little consequence because in the context of Nagaland it has been held that even though the provisions of the CrPC are not applicable in certain districts of the State of Nagaland, it only means that the rules of the CrPC

would not apply but the authorities would be governed by the substance of these rules.'' It has also to satisfy the standard of fairness as is implicit in Article 2.1 of the Constitution.[5 6]

In the case of the State of Jammu and Kashmir, Parliament's power to legislate is limited because of the special status given to that State by Article 370 of the Constitution. At present, as Parliament has no power to legislate for that State in respect of Criminal Procedure, the territorial jurisdiction of the Code has not been extended to that part of India. This might create anomalies in certain situations, but considering the present relationship of the State of Jammu and Kashmir with the rest of India, that seems rather unavoidable.

1.5 Scope of the applicability of the Code

Generally speaking, the CrPC is applicable in respect of the investigation, inquiry or trial of every offence under the substantive criminal law, *i.e.* whether such offence is punishable under the IPC or under any special or local law.[7] However, the rule is not unduly rigid. If the exigencies of the subject-matter or of the local conditions require a special procedure to be allowed in respect of certain offences, the Code makes room for such special law and procedure and gives it precedence over the normal procedure provided by the CrPC. This is clear from Sections 4 and 5 which are as follows:

Trial of offences under the Indian Penal Code and other laws

4. (1) All offences under the Indian Penal Code (45 of i860} shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(z) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Saving

5. Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or

5. *Mown* v. *Supt., Special Jail,* (1971) 3 SCO 936: 1972. SCC (Cri) 1S4; *Saptawna* v. *State of Assam,* (1972) 4 SCC (N) 45: 1971 SCC (Cri) 247, 248; *Srinivas Gopal* v. *UT of Arunacbal Pradesh,* (1988) 4 SCC 36: 1988 SCC (Cri) 889: 1988 Cri LJ 1803; *Naga People's Movement for Human Rights* v. *Union of India,* {1998) 2 SCO 109: 1998 SCC
6. *Zarzoliana* v. *State of Mizoram,* 19S1 Cri LJ 1736, 1740 (Gau).
7. *Khatri* (4) v. *State of Bihar,* (1981) 2 SCC 493: 1981 SCC (Cri) 503, 507: 1981 Cri Lj 597; *Rohtas* v. *State of Haryana,* (1979) 4 SCC 229 : 1979 SCC (Cri) 963, 965-.

under the Code which are apart from investigation, inquiry or trial of the offence, and not to such disciplinary proceedings.[8]

The CrPC does not apply to contempt of court proceedings as contempt of court is not an offence within Section 4(2).[9] Further, if the contempt proceedings are taken by the High Court under the Contempt of Courts Act, the proceedings are in the exercise of "special jurisdiction" within the meaning of Section 5 and hence the provisions of the CrPC are not applicable to such proceedings.[10]

The jurisdiction given to ordinary criminal courts under Section 4(1) would be excluded only when a special Act applies and the jurisdiction of the regular courts to try particular cases under the IPC is specifically excluded under that Act by vesting such jurisdiction exclusively in the Special Tribunals established under the Act.[11] When no special or differ- ent procedure is provided by the special Act, the procedure provided by the Code is to be followed.[12]

For investigating or inquiring into an offence under the Bombay Prevention of Gambling Act, 1887 a special procedure has been provided by the Act. In case of such offence, Section 4{2} is applicable and the special procedure prescribed by the Act w'ould prevail over the normal procedure provided by the Code.[18]

It has been ruled by the Supreme Court that Foreign Exchange (Regulation) Act, 1973 (FERA) being a special law, containing provisions for investigation, inquiry, search, seizure, trial and imposition of punishment for offences under FEMA, Section 5 CrPC is not applicable in respect of offences under FEMA.[14]

The Juvenile Justice (Care and Protection of Children) Act, 2000 prescribes special procedure while dealing with offences committed by delinquent children. Such special procedure, according to Section 5, would prevail over the procedure prescribed by the CrPC. Section 27 of the Code which, inter alia, enables certain courts to try children for certain offences, is only an enabling provision. As such, in relation to the Haryana Children Act, 1974, it cannot be said to be a specific provision to the contrary within the meaning of Section 5 of the Code.[11] Therefore that section does not affect the provisions of any State or Central Children Act.

S. *R.P. Kapur* v. *Pratap Singh Kairon,* (1964) 1 Cri Lj 2.24: AIR 1961. SC 1117 (The decision was under S. 5 of the old Code which corresponds to S. 4 of the Code of 3973).

9. *State* v. *Padma Kant Malviya,* AIR 1954 All 523 (FB).

10. *Sukhdev Singh Sodhi v. Teja Singh,* 1954 Cri Lj 4601 AIR 1954 SC 186.

11. *Bhim Sen* v. *State ofU.P.,* 1955 Cri LJ 1010: AIR 1955 SC 435.

12. *Si shir Kumar Mitter* v. *Corpn. of Calcutta,* (1925-26) 30 CWN 598; *Vijaya Prakash* v. *Hyderabad Municipal Corpn,,* AIR 1957 AP 469; *Badrinaram* v. State, AIR 1961 Raj 48; *N lira tan Sircar* v. *Lakshmi Narayan Ram Nivas,* (1965) 1 Cri LJ r00: AIR 1965 SC 1.

].L *Emperor* v. *Kaitan Dinning Eernad,* I'LR (1907) 31 Bom 438; *Fernando* v. *Fernando,* AIR 1929 Mad 604 (The case was under the Abkari and Opium Acts).

14. *C.BI* v. *State of Rajasthan,* (1996) 9 SCC 755: 1996 SCC (Cri) 1090.

15. *Ragbbir* v. *State of Haryana,* (1981) 4 SCC 210: T981 SCC (Cri) 818: 1981 Cri LJ 1497. A

In respect of sentences passed by court martial under the provisions of the Army Act, the set off of pre-conviction detention under Section 428 has been held not applicable. The conflict[16] among the High Courts on this point has been resolved by the Supreme Court in *Ajmer Singh* v. *Union of India*[17], Consequent upon this decision Section 169-A which is similar to Section 428 of the Code has been enacted in the Army Act, 1950 and now the benefit of set off is available to those sentenced under the Army Act, 1950.

The Supreme Court has ruled that Section 433-A of the Code also will be applicable to those sentenced under the Army Act as there is no specific or contrary provision covering the same area in it.[is]

The Supreme Court has ruled that Section 37, Narcotic Drugs and Psychotropic Substances Act, 1985, dealing with grant of bail, being a special enactment, general provision of Section 439 of the Code has to be read subject to Section 37 in view of Section 4 of the Code.[19]

1,6 Code how far exhaustive

The Code has obviously tried to make itself exhaustive and complete in every respect; and it has generally succeeded in this attempt. However, if the court finds that the Code has not made specific provision to meet the exigencies of any situation, the court has inherent power to mould the procedure to enable it to pass such orders as the ends of justice may require.[20] It has, however, been declared by the Supreme Court that the subordinate courts do not have any inherent power.[21] The High Court has inherent powers and that has been given partial statutory recognition by enacting Section 482 which says:

> 482. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

Saving of inherent powers of High Court

contrary view held by the majority of the Full Bench of the High Court of Madhya Pradesh in ***Devisingh*** v. ***State of M.P.,*** 197S Cri LJ 585 (FB) (MP) has been held by the Supreme Courr as erroneous. ***Ibid,*** 82.2.. See also, ***Rohtas*** v. ***State of Haryana,*** (1979) 4 SCC 229: 1979 SCC (Cri) 963, 965: 1979 Cri Lj 1365.

16. *Snbramonian* v. O.C. *Armoured Static Workshop,* 1979 Cri IJ 617 (Ker). But see contra, *E.R. Jesuratna?n* v. *Chief of Air Staff,* 1976 Cri Lj 65 (Del); *T.S. Ramani* v. *Supt. of Prison,* 1984 Cri Lj 892 (Mad).

17 (1987) 3 SCC 340: 1987 SCC {Cri} 499: 1987 Cri Lj 1877.

. ***Union of India*** v. ***Sadha Sitzgh,*** (X999S 8 SCC 375: 1999 SCC (Cri) 1442.

IS. ***Narcotics Control Bureau*** v. ***Kishan Lai,*** (1991) 1 SCC 705: 199a SCC (Cri) 265: 1991: Cri Lj 654.

19 ***Akhil Bandhu Ray*** v. ***Emperor,*** (1958} 39 Cri LJ 596: AIR 1938 Cal 258; ***Krushna Mohan*** v. ***Sudbakar Das,*** AIR 1953 Ori 281; ***Nagen Kundu*** v. ***Emperor,*** ILR {1934} ***61*** Cal 498. Also see, ***District and Sessions Judge, re,*** 19S6 Cri LJ 1966 {Ker).

21. A..S. ***Gauraya v, S.N. Thakur,*** {1986} 2 SCC 709: 1986 SCC (Cri) 249: 1986 Cri Lj 1074.

Chapter 2

Constitution of Criminal Courts

The functionaries under the Code 2.1

The functionaries exercising powers and discharging duties under the Criminal Procedure Code, ı̈73 (CrPC) are: 1) the police; 2) the prosecutors; 3} defence counsels; 4) Magistrates, and judges of higher courts; and 5) the prison authorities and Correctional Services Personnel. Amongst these the role of the Magistrates and courts is pivotal; the other functionaries are, in a way, accessories only. It is therefore expedient to consider first, the Constitution and hierarchy of the criminal courts, their territorial jurisdictions, and their powers.

Territorial divisions 2,2

It is obviously expedient to have suitable territorial units for the purposes of administration whether judicial or otherwise. The size and the number of such units would depend upon the needs of the administration.

The entire territory of India consists of States, and for the purposes of the Code, the basic territorial divisions of a State are the districts and the Sessions Divisions. According to Section 7, every State shall be a Sessions Division or shall consist of Sessions Divisions; and every Sessions Division shall, for the purposes of this Code, be a district or consist of districts. Further, after consultation with the High Court, the State Government can divide any district into sub-divisions, and can also alter the limits or the number of such Sessions Divisions, districts, or the sub-divisions of any district.

The Code has also considered the special needs of big cities like Bombay, Calcutta and Madras and has recognised such cities as separate territorial units and designated them as metropolitan areas. For the purposes of the Code each metropolitan area is to be considered as a separate Sessions Division and district.[1] For the metropolitan areas, the Code has envisaged

1. *See,* proviso to snb-s. (1) of S. 7.

a set-up of courts different from the one devised for the other parts of the State. It has been observed that "the administration of criminal justice in large cities requires a measure of special treatment. The magistrates there ought to be better qualified and more competent to deal expeditiously with sophisticated crimes, particularly in the socio-economic field, which are more common in the cities."[2]

Formerly, in the Presidency-towns of Bombay, Calcutta and Madras, the magisterial work was in the hands of a special category of Magistrates known as the Presidency Magistrates. Usually persons appointed to these posts were having special qualifications or experience and were paid higher emoluments. The procedure followed by these Magistrates took less time. The system having been found useful in respect of such big cities, was adopted for the city of Ahmedabad by a local law\ Now the Code has adopted a similar system for the metropolitan areas. Section 8 declares each of the Presidency-towns of Bombay, Calcutta and Madras, and the city of Ahmedabad as a metropolitan area and further empowers the State Government to declare that any area in the State comprising a city or town whose population exceeds one million shall be a metropolitan area for the purposes of the Code. The section also empowers the State to extend, reduce, or alter the limits of such area but not so as to reduce the population of such area to less than one million. If the population of a metropolitan area in fact falls below one million, such an area shall cease to be a metropolitan area on the date specified in this behalf by the State Government concerned.

23 Classes of criminal courts

The Supreme Court of India and a High Court for each State have been created by the Constitution, and their jurisdictions and powers—including those in respect of criminal matters—are well defined in the Constitution itself. In addition, the CrPC makes provision of appeal to the Supreme Court under certain circumstances,[3] and also enables the Supreme Court to transfer, in the interests of justice, cases and appeals from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court subordinate to another High Court.[4]

The Constitution, by Article 227, provides that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The CrPC further provides that every High Court shall so exercise superintendence over the courts of Judicial Magistrates subordinate to it as to ensure an expeditious and proper disposal of cases by such Magistrates.[5] The Code has [1]

1. 41s: Report, p. 17, para. 2.11.
3. Ss. 374 and 379.

also entrusted every High Court with numerous powers and duties including those relating to appeals and revisions.

Apart from the Supreme Court and High Courts, the following classes of criminal courts have been described by Section *6* which is as follows:

6. Besides the High Courts and the Courts constituted under any law, other *Classes of Criminal* than this Code, there shall be, in every State, the following classes of Criminal *Courts* Courts, namely:—

(z) Courts of Session:

(h) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;

(Hi) Judicial Magistrates of the second class; and (iv) Executive Magistrates.

The words "and the courts constituted under any law, other than this Code[5]" would include courts like the Children's Courts under the Juvenile Justice (Care and Protection of Children} Act, zooo, or the courts called as "Nyaya Panchayats" or "Panchayati Adalats" constituted under the different State Panchayati Raj Acts, or the special courts established under the Criminal Law Amendment Acts.

Though an Executive Magistrate is one of the classes of courts, that does not mean that where he functions administratively and not judicially he functions as a court.[6]

Separation of judiciary from the executive 2.4

Section *6* mentions the courts of Executive Magistrates as a separate category distinct from the courts of Judicial Magistrates. This marks the adoption of the policy of the separation of the judiciary from the executive. Formerly, most of the Magistrates used to perform both judicial and executive duties.

They were appointed, supervised and otherwise controlled by higher executive authorities and ultimately by the State Government. Our Constitution has directed that the State shall take steps to separate the judiciary from the executive in the public services of the State.[7] Accordingly some States tried to implement the direction in their own ways. However, the implementation of the Constitutional direction was neither full nor uniform. The Code, in accordance with the recommendations of the Law Commission,[8] has provided for the separation of the judiciary from the executive on an all-India basis in order to achieve uniformity in this matter.

Reference to Judicial Magistrates and Executive Magistrates as constituting separate courts in Section 6, and the subsequent provisions relating to the High Court's complete and exclusive control over the Judicial Magistrates would indicate the effective separation of the judiciary from the executive.

6. *Mammon* v. *State of Kerala,* 1980 Cri Lj (NOC) 7; (Ker) (FB).
7. Art. 50 of the Constitution of India.

S. 41st Report, p. 14, para. z.*i.*

The real purpose of this reform of separation is to ensure the independent functioning of the judiciary. It is implicit in the separation that no judge or Judicial Magistrate would be in any way connected with the prosecution nor would be in direct administrative subordination to anyone connected with the prosecution. In a criminal trial, as the State is the prosecuting party, it is of special significance and importance that the judiciary is freed of all suspicion of executive influence or control, direct or indirect. The separation incidentally ensures that officers will devote their time entirely to judicial duties and this fact would lead to efficiency in the administration of justice.[9] [10] [11] It has been observed, "In addition to ensuring fair deal to the accused, separation as provided..., would ensure improvement in the quality and speed of disposal, as all judicial Magistrates would be legally qualified and trained persons working under close supervision of the High Court."[10] *1*

For proper separation of the judiciary from the executive, the Code has contemplated, as mentioned earlier, two categories of magistrates—Judicial Magistrates, and the Executive Magistrates. The former are under the control of the High Court, while the latter are under the control of the State Government. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are "police" or administrative in nature are the concern of the Executive Magistrates.[u]

2.5 Court of Session

For every Sessions Division the State shall establish a Court of Session which shall be presided over by a judge to be appointed (this does not refer to the first appointment) by the High Court. [S. 9(1), (2)]; The High Court may also appoint Additional Sessions judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session. [S. 9(3)]; The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify.[12] [S. 9(6)]; A person appointed as a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge, would be exercising jurisdiction in the Court of Session and his judgments and orders would be those of the Court of Session.[13]

The Additional Sessions Judge {or the Assistant Sessions judge) exercises the powers of a Court of Session, subject to the limitations prescribed by law, but is not an independent Court of Session.[14] All Assistant

9. 14th Report, Vol. II, p. 85c, para. 2.
10. Statement of Objects and Reasons, para. 4.
11. Notes on els. 6-24.
12. See also, *Kehar Singh* v. *State (Delhi Admn.),* {1988} 3 SCC
13. *Gokaraju Rangaraju* v. *State ofA.P*{1981) 3 SCC 132: 1981 SCC (Cri) 652,
14. *Rahul Sharma* v. *State of Rajasthan,* 1978 Cri LJ 1276, 1278 (Raj). See also,

Sessions Judge shall be subordinate to the Sessions Judge in whose court they exercise jurisdiction. [S. io{i)];

A Civil Judge and Chief Judicial Magistrate while acting as in-charge. Sessions Judge does not have powers of a Sessions Court appointed under Section 9 of the Code for granting bail in serious cases.[15]

Courts of Judicial Magistrates 2.6

(a) *Courts or Special Courts of Judicial Magistrates of First Class or Second Class.*—In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the First Class and of the Second Class, and at such places, as the State Government may, after consultation with the High Court, by notification specify. [S. 11(1)] The State Government may also, after consultation with the High Court, establish, for any local area, one or more special courts of Judicial Magistrates of the First Class or of the Second Class to try any particular case or particular class of cases, and where any such Special Court is established, no other court of Magistrate in the local area shall have jurisdiction to try any such case or class of cases for the trial of which such special court of Judicial Magistrate has been established, [proviso to S. 11(1)] The power to determine the number of courts of Judicial Magistrates of either class and their location is left to the State Government since it will have to take into account various administrative and financial considerations. The State Government, however, is required to exercise this power in consultation with the High Court in order that Magistrates' Courts are established in adequate number in all districts and at suitable places.[16] In order to make the separation of judiciary effective, the conferment of magisterial powers is kept with the High Court, and it has been provided that the presiding officers of such courts shall be appointed by the High Court; [S. 11(2)] and it is further provided that the High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the First Class or of the Second Class on any member of the Judicial Service of the State, functioning as a judge in a civil court. [S. 11(3)] This would enable the High Court to provide for situations where it might not be necessary or possible to appoint full-time Judicial Magistrates.

(.b) *Chief Judicial Magistrate.*—In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the First Class to be the Chief Judicial Magistrate. [S. 12(1)] He is head of the Magistracy in the district.[17] His main function would be to guide,

15. *State of Karnataka* v. *Channabasappa,* 1992 Cri LJ 95 (Kant).
16. 41st Report, p. 22, para. 2.24.
17. *Delhi Judicial Service Assn.* v. *State of Gujarat,* {1991) 4 SCC 406: 1991 Crt LJ

supervise and control other judicial Magistrates in the district. He would also try important cases.

(c) *Additional Chief judicial Magistrate.*—The High Court may appoint any Judicial Magistrate of the First Class to be an Additional Chief Judicial Magistrate, and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate as the High Court may direct. [S. 12(a)]

{d) Sub-Divisional Judicial Magistrate.—The High Court may designate any Judicial Magistrate of the First Class in any sub-division as the Sub-Divisional Judicial Magistrate. Subject to the general control of the Chief Judicial Magistrate, such Sub-Divisional Magistrate shall also have and exercise such powers of supervision and control over the work of the judicial Magistrates (other than Additional Chief judicial Magistrates) in the sub-division as the High Court may specify. [S. 12(3)]

2.7 Local jurisdiction of Judicial Magistrates

Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits of the areas within which the Judicial Magistrates may exercise ail or any of the powers which they might be invested under the Code. But if the jurisdiction and powers of a Judicial Magistrate are not so defined, they shall extend throughout the district. [S, [14]

2.8 Subordination of Judicial Magistrates

Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate. [S. 15(1)] The Sub-Divisional Judicial Magistrate also, subject to the general control of the Chief judicial Magistrate, shall have and exercise such powers of supervision and control over the work of the judicial Magistrates {other than Additional Chief Judicial Magistrate) in his subdivision as the High Court may specify. [S. 12(3)]

2.9 Courts of Metropolitan Magistrates

As in a district, every metropolitan area will have almost a parallel set-up of Judicial Magistrates. In every metropolitan area, the State Government may, after consultation with the High Court, establish courts of Metropolitan Magistrates at such places and in such number as it may specify. [S. 16(1)] The presiding officers of such courts shall be appointed by the High Court, and the jurisdiction and powers of every such Magistrate shall extend throughout the metropolitan area. [S. 16(2), (3)] Likewise, m every metropolitan area, the High Court shall appoint a Metropolitan Magistrate as Chief Metropolitan Magistrate. It may similarly appoint an

Additional Chief Metropolitan Magistrate and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate as the High Court may direct. [S. 17]

It may be noted that though the Code makes a specific special provision in relation to a district (other than a metropolitan area} for the establishment of special courts of the judicial Magistrates to try any particular case or class of cases,[18] it does not likewise provide for the establishment of special courts of Metropolitan Magistrates.

Subordination of Metropolitan Magistrates

2.10

The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate. [S. 19(1)] For the purposes of the Code, the High Court may define the extent of subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate. [S. 19(2)]

Special Judicial Magistrates and Special Metropolitan Magistrates

2.11

(<3} The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the government, all or any of the powers conferred or conferrable by or under the Code on a Judicial Magistrate of the First Class or of the Second Class or on a Metropolitan Magistrate, as the case may be, in respect to particular cases or to particular classes of cases, in any district or metropolitan area, as the case may be. It may, however, be noted that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify. [Ss. 13 & 18] The persons on whom the powers of a Judicial Magistrate or of a Metropolitan Magistrate have been conferred are to be called as Special judicial Magistrates or Special Metropolitan Magistrates, as the case may be.

(b) Special Magistrates could be appointed by the State Government even under the earlier Code of 1898. These Magistrates were not stipendiary and were called as Honorary Magistrates. It was often alleged that the appointments of such Magistrates were made by governments on extraneous considerations and not on the basis of merit. There was also widespread criticism against the working of the system of Honorary Magistrates. In some States the practice of appointing such Magistrates was therefore given up. However, in certain other States, the practice of appointing retired government officers as Special Magistrates to dispose

18. See *supra,* para, 2.6(a); proviso to S. ri(i).

of petty cases had been adopted with advantage. It has been observed in favour of the system as such, that, "The Honorary Magistrates are intended to give relief to the Stipendiary Magistrates in their works; most of the work entrusted them is of a petty type which does not require to be dealt with by a trained judicial officer and which would needlessly clog the files of Stipendiary Magistrates. The institution of the Honorary Magistrates is also helpful as a method of associating the public with criminal judicial administration."[19] Further, it has been pointed out that "in remote or inaccessible localities or areas with thin population, the available work may not justify the appointment of a full-time Magistrate. In such situations there is a practice in some States to confer the powers of a Magistrate on a local officer of Government, like the Sub-Registrar, to dispose of the few criminal cases arising in such areas. This will be a facility to the local inhabitants who otherwise would have to travel a long distance to reach a Magistrate's Court."[20]

{c) For these reasons, the enabling provisions contained in Sections 13 and 18 have been enacted, and the system of Honorary Magistrates has been continued in a modified form. It may be noted that according to Sections 13 and 18: /} the persons to be appointed as Special Magistrates must be either persons in government service or those who have retired from government service; *ii)* the persons to be appointed as Special Magistrates must have the qualifications and experience as prescribed by the High Court; *Hi)* the appointment is to be made by the High Court and not by the State Government; *iv)* the appointment is to be for a period not exceeding one year at a time; *v)* according to Section 13(3) the High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate in relation to any metropolitan area; *vi)* similarly, according to Section 18(3} the High Court or the State Government, as the case may be, may empower any Special Metropolitan Magistrate to exercise, in any local area outside the metropolitan area, the powers of Judicial Magistrate of First Class. It is rather difficult to understand why the State Government has been authorised, along with the High Court, under this sub-section. This is unlike the abovesaid Section 13(3) and appears to be somewhat inconsistent with the scheme of separation of the judiciary from the executive.

2.12 Executive Magistrates

{a) Executive Magistrates are appointed for performing magisterial functions allotted to the executive. This becomes essential while implementing the policy of separation of the judiciary from the executive. In every district and in every metropolitan area, the State Government may

appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate. [S. z0{i)] The State Government may also appoint any Executive Magistrate to be an Additional District Magistrate who shall have such powers of a District Magistrate as may be directed by the State Government. [S. 20(2)] Further, the State Government may place an Executive Magistrate in charge of a sub-division and such Magistrate shall be called as the Sub-Divisional Magistrate. [S.
2,0(4)] The State Government's power to deploy Executive Magistrates as in charge of sub-divisions can now be delegated to the District Magistrates facilitating quick deployment of magistrates at local level. New sub-section 4-A has been incorporated enabling the State Governments to do so.[21 22]

{b) In some States, particularly in some metropolitan areas, the practice of conferring on a Commissioner of Police some magisterial powers of an executive nature has already been in vogue. The Supreme Court had occasion to dwell on the powers of the State Governments, to appoint District Magistrate for the purposes of the Immoral Traffic (Prevention) Act, 1956.
Reading sub-sections (1), (2) and {3) in conjunction, the Supreme Court in *A.N. Roy* v. *Suresb Sham Singh*[21 22], held that the State has power to appoint the Commissioner of Police of Birhan, Mumbai, which is a metropolitan area as an Executive Magistrate and to further appoint him as an Additional District Magistrate who shall have the powers of a District Magistrate.

This well-established and smoothly operating arrangement, if authorised by any local law, has been allowed to continue by sub-section {5) of Section 20.[23] But where this is not done, and also for discharging other functions of the Executive District Magistrate, each metropolitan area shall have an Executive District Magistrate as provided by sub-section (1) of Section 20.

Special Executive Magistrates 2.13

Section 21 provides:

> 21. The State Government may appoint, for such term as it may think fit, *Special Executive* Executive Magistrates, to be known as Special Executive Magistrates, for *Magistrates* particular areas or for the performance of particular functions and confer on such Special Executive Magistrates such of the powers as are conferrable under this Code on Executive Magistrates, as it may deem fit.

21. *Vide* sub-s. {4-A) incorporated by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005).

22. See, *A.N. Roy* v. *Suresh Sham Singh.* {2006) 5 SCC 745: (2006) 5 SCC (Cri) 75.

23. M. *Narayanasiuamy* v. *State ofT.N1984* Cri Lj 1583 (Mad). See also, *Kadra Pahadiya* v. *State of Bihar, (1997)* 4 SCC 287: 1997 SCC (Cri)

2.14 Local jurisdiction of Executive Magistrates

Section 21 provides:

Local jurisdiction of Executive Magistrates

22. (i) Subject to the control of the State Government, the District Magistrate may, from time to time, define the local limits of the areas within which the Executive Magistrates may exercise all or any of the powers with which they may be invested under this Code,

(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.

The purpose of empowering State Governments to appoint Special Executive Magistrates is to meet the special needs of an area or to perform certain functions in a specified area.[24]

2.15 Subordination of Executive Magistrates

All Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-Divisional Magistrate) exercising powers in a sub-division shall also be subordinate to the Sub-Divisional Magistrate, subject, however, to the general control of the District Magistrate. [S. 23(1)] Executive Magistrates are undoubtedly subordinate to Court of Session as well. They must promptly send up the records of the cases whenever they are requisitioned by the Court of Session.[25]

However, a case from Sub-Divisional Magistrate's Court cannot be transferred by the Court of Session though it is a criminal court. Transfer can be made under Section 411 by the District Magistrate to whom the Sub-Divisional Magistrate is subordinate.[26]

2.16 Sentences which the courts may pass

(a) A High Court may pass any sentence authorised by law. [S. 28(1}]

(b) A Sessions Judge or an Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such judge shall be subject to confirmation by the High Court. [S. 28(2)]

(c) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 10 years. [S. 28(3}]

(d) A Chief Judicial Magistrate or a Chief Metropolitan Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years. [S. 29(1) read with S. 29(4)]

24. *State of Maharashtra* v. *Mohd. Salim Kh*
25. *Mansur* v. *State of M.P.*, 1986 Cri LJ 57 (MP). Also see,
26. *State of Gujarat* v. *Ratilal Uttamchand*

(e) A judicial Magistrate of the First Class or a Metropolitan Magistrate may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both. [S. 29(a) read with S. 29(4)]

f) A Judicial Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees or both. [S. 29(3) read with S. 29(4)]

TABLE **1**: Territorial Divisions [Ss. **1**(**2**), **7** & 8]

India
(excluding the State of Jammu and Kashmir)

States

Sessions Divisions

Districts

Sub-divisions

Metropolitan Areas (every metropolitan area is a separate

TABLE 2: Hierarchy of criminal courts

Supreme Court

High Courts

Sessions Courts
(Sessions Judge, Additional Sessions Judge)

Assistant Sessions

Chief Metropolitan

(Additional Chief Metropolitan Magistrate)

Chief Judicial Magistrate

Metropolitan Magistrates Special Metropolitan Magistrates (Honorary)

(Additional Chief Judicial

Sub-Divisional Judicial Magistrates

Judicial Magistrates of

Special Judicial Magistrate

Judicial Magistrates of Second

Special Judicial Magistrates

TABLE 3: Sentence which may be passed by the criminal courts [Ss. 28 &

Supreme Court or High Court	Any sentence authorised hy law.
Sessions Judge or Additional a Sessions Judge f	Any sentence authorised by law- sentence of death is subject to confirmation by High Court
Assistant Sessions Judge j	Imprisonment up to lOyears or/and fine.
Chief Judicial Magistrate or] Chief Metropolitan Magistrate J	imprisonment up to 7 years or/and fine.
Judicial Magistrate of Class I, \ or Metropolitan Magistrate J	Imprisonment up to 3 years or/and fine up to? m.nnn/
Judicial Magistrate of Class II j	Imprisonment up to 1 year or/and fine up to? 50002

t. Vide S. 5, Code of Criminal Procedure (Amendment) Act,

TABLE 4: Hierarchy of Executive Magistrates

District Magistrate
(Additional District Magistrate)

Sub-Divisional Magistrate
j

I
Executive Magistrate
n/r _;_j j._

""H
Special Executive

Chapter 3

Police, Prosecutors, Defence Counsels, Prison Authorities

The police 3.1

Having considered the constitution and jurisdiction of criminal courts in the preceding chapter, it is proposed to discuss in this chapter the other functionaries under the Code, namely, the police, the prosecutors, the defence counsels, and the prison authorities as well as the correctional services personnel.

The ordinary criminal courts originate from the provisions of the Criminal Procedure Code, 1973 (CrPC). In the case of the police force it is somewhat different. The Code presupposes the existence of the police and police officers; and it only arms them with certain powers and directs them to discharge certain duties.

Function and organisation of the police: The Police Act, 1861 3.2

The police force is an instrument for the prevention and detection of crimed Every State Government establishes its own police force which is formally enrolled. The force consists of such number of officers and men and is constituted in such manner as the State Government may decide from time to time. The overall administration of the police in the entire State is vested in the Director-General of Police. The administration of police in every district vests in the District Superintendent of Police under the general control and direction of the District Magistrate who is usually the Collector of the district.[1] [2] Every police officer appointed to the police

1. The Police Act, 1861,
2. *Ibid,* S. 4.

force other than the Inspector-General of Police (or Deputy or Assistant Inspector General of Police) and the District Superintendent of Police (or Assistant District Superintendent of Police) receives a certificate in the prescribed form by virtue of which he is vested with the powers, functions and privileges of a police officer. The certificate shall cease to be effective and shall be returned forthwith when the police officer ceases to be a police officer.[3]

3.3 Other Police Acts

The Police Act, 1888 enables the Central Government to create a special police district embracing parts of two or more States and to extend to every part of such district the powers and jurisdiction of a police force belong- ing to a State specified by the Central Government. This, of course, can be done only with the concurrence of the State Governments concerned.

The Police Act, 1949 creates a police force for the Union Territories, following the pattern of the Police Act, 1861.

The reorganisation of police has been on the agenda of the State Governments and Central Government for quite sometime in fact many commissions/committees have gone into this question and made many recommendations. Despite the lapse of several years no action was taken by the Central Government or the State Governments. The Supreme Court was therefore approached by way of a public interest litigation for compelling the government to act. Thus in *Prakasb Singh* v. *Union of India*[4], the Supreme Court issued some guidelines as to the police set-up and directed the States and the Centre to reorganise their police set-up as envisaged in its judgment. Several States are however yet to reorganise the police accordingly.

The Delhi Special Police Establishment Act, 1946 has played an important leading role in police operations in recent years. The Act provides for the constitution of a special force in Delhi for the investigation of certain specified offences in the Union Territories and also provides for the extension of the operation of this police force to other parts of India with the concurrence of the State Governments concerned. The image of Central Bureau of Investigation's (CBI) impartiality and independence has often made the public to demand investigation by it in preference to investigation by State police. And bypassing the inherent restrictions in Sections 3, 4 and 5 of the Act, the judiciary used to order investigation by the CBI.[5] This has been ruled to be valid by the Supreme Court.[6]

3. ***Ibid,*** S. S. See aiso, ***Supt. of Police v. Divarka Das,*** (1979) 3 SCC 7
4. 1(2.006) S SCC 1: (2006^ 3 SCC (Cri) 427.
5. ***State of Bihar*** v. ***Ranchi Ziia Samta Party,*** (1996) 3 SCC 682: 1996 Cri Lj 2.168; ***CBI*** v. ***Shin Kumar Singh,*** 1998 Cri LJ 4131 (Dei).
6. See, *State ofW.B, v. Committee for Protection of Democratic Rights,* (2. 010} 3 SCC 571: (2020) 2 SCC (Cri) 401.

However, the CBI has also come for serious criticism. In one case where the State Government on receipt of a "no-case" report by the CBI went to the extent of ordering reinvestigation by the State police after withdrawing its consent given to the CBI earlier under Section *6* of the Act. The Supreme Court ruled that the withdrawal of consent to enable the State police to further investigate into the case was patently invalid as the CBI alone had the right to further investigate into the case.[7]

The gap in the law providing for investigation into the corruption charges against the higher-ups in the administration has made the Supreme Court to envisage a comprehensive legislation making provision for freedom from interference.[8] Accordingly the Central Vigilance Commission Act, 2003 (45 of 2003} reconstituting the Central Vigilance Commission has been brought into force.

Police under the Code 3.4

The CrPC confers specific powers, for example, power to make arrest, search, etc. on the members of the police force who are enrolled as police officers.

Wider powers have been given to police officers who are in charge of police stations. Such station-house officers are also required to discharge onerous duties in relation to detection, investigation and prevention of offences. The term "police station" means "any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf', [cl. (s) of S. 2] The ordinary meaning of the words "officer in charge of a police station" has been purposely broadened by clause (o) of Section 2 which says:

> 2. fo) "officer in charge of a police station" includes, when the officer in charge *Definitions* of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station- house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;

This only shows the importance of the duties of the station-house officer and the concern of the Code for their prompt discharge.

Police officers above the rank of a station-house officer are invested with the powers of the station-house officer but over larger local limits.

Section 36 of the Code says:

> 36. Police Officers superior in rank to an officer in charge of a police station *Powers of superior* may exercise the same powers, throughout the local area to which they are ***officers of police*** appointed, as may be exercised by such officer within the limits of his station.

/. *K. Chandrasekhar* v. *State of Kerala,* (1998) 5 SC-C 2.23: 1998 SCC (Cri) .1291. 8. *Vineet Narain* v. *Union of India,* (1998) 1 SCC 226: 1998 SCC (Cri) 307.

This again shows the key role given by the Code to police stations in the scheme of investigation and prevention of crime.

The use of the word "rank" in Section 36 comprehends the hierarchy of police officers. If the Inspector-General, Vigilance, is an officer superior in rank to an officer in charge of a police station, he could in view of Section 36 exercise the powers of an officer in charge of a police station throughout the local area to which he has been appointed {in this case the entire Bihar State).[9]

3.5 Public Prosecutors

A crime is a wrong not only against the individual victim but also against the society at large. It is because of this consideration that the State, representing the people in their collective capacity, participates in a criminal trial as party against the person accused of crime more particularly if the crime is a cognizable offence. The Public Prosecutor or the Assistant Public Prosecutor is the counsel for the State in such trials. His duties mainly consist in conducting prosecutions on behalf of the State. The Public Prosecutor also appears as State Counsel in criminal appeals, revisions and such other matters in the Sessions Courts and the High Courts. The Public Prosecutor should not, however, appear on behalf of accused.[10] The Public Prosecutor or the Assistant Public Prosecutor has authority to appear and plead before any court in any case entrusted to him. [S. 301] With the consent of the court he can withdraw from the prosecution against any person. [S. 321] He can give advice to the police or other government departments with regard to the prosecution of any person if his advice is so sought.

According to the pattern set by the CrPC, while Public Prosecutors (including Additional Public Prosecutors and Special Public Prosecutors) are to conduct prosecutions and other criminal proceedings in the Sessions Courts and the High Courts, Assistant Public Prosecutors are appointed for conducting prosecutions in the Magistrates' Courts. According to the prevailing practice, in respect of cases initiated on police reports, the prosecution is conducted by the Assistant Public Prosecutor and in cases initiated on a private complaint, the prosecution is either conducted by the complainant himself or by his duly authorised counsel. In such cases also the State can appoint prosecutors if the cause has public interest.[11] According to the formal definition given by clause (u) of Section 2, Public Prosecutor means "any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor". Assistant Public

9. *State of Bihar* v. *J.A.C.Saldanha,*
10. *Sunil Kumar Pal* v. *Phota Sheikh,* (1984) 4
11. *Nlukul Dalai* v. *Union of India,*

are not covered by this definition as they are not appointed under Section 24; at the same time they have not been defined separately.

Public Prosecutors and Additional Public Prosecutors for High Courts 3.6

In this connection the following points may be noted:

(a) A person shall be eligible to be appointed in High Court as Public Prosecutor if he has been in practice as an advocate for not less than seven years; [S. 24(7}] however, it has been clarified by Section 24(9) that the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of the Code) service as any prosecuting officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.

(b) The appointing authority can make the appointment only after consultation with the High Court. [S. 24(1}]

(c) The Central Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for conducting in a High Court any prosecution, appeal or other proceeding on behalf of the Central Government. [S. 24(1)]

{d} Similarly, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for conducting in a High Court any prosecution, appeal, etc., on behalf of the State Government. [S. 24(1)]

The State Government may appoint a Director of Public Prosecutions; but he shall be functioning under the Advocate- General of the State.[12]

(e) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, an advocate who has been in practice for not less than 10 years as a Special Public Prosecutor; [S. 24(8)] the clarification regarding the period given in sub-para, *(a)* above is applicable here also.

Public Prosecutors and Additional Public Prosecutors for the districts 3.7

(a) A person shall be eligible to be appointed as a Public Prosecutor or Additional Public Prosecutors if he has been in practice as an advocate for not less than seven years; [S. 24(7)] the explanation regarding the period given in para. *3.6(a)* above is applicable here also.

VI. Thilayil Abdurahiman v. *State of Kerala,* 1997 Cri LJ z i99 (Ker).

(b) The District Magistrate shall, in consultation with the Sessions judge, prepare a panel of names of persons who are, in his opinion, fit to be appointed as the Public Prosecutor or Additional Public Prosecutors; [S. 24(4)3 and no person shall be appointed as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears on such panel; [$. 24(5)] however, where in a State there exists a regular cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre.[13] But if, in the opinion of the State Government, no suitable person is available in such cadre for such appointment then the government may appoint a Public Prosecutor or an Additional Public Prosecutor from the panel of names prepared by the District Magistrate as mentioned above. [S. 24(6)]

(c) Consistent with the above rules, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district; [S. 24(3)] further it is possible that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(d) The Central Government or the State Government may appoint for the purposes of any case or class of cases, an advocate who has been in practice for not less than 10 years as a Special Public Prosecutor. [S. 24(8)] The explanation regarding the period given in para. *3.6(a)* above is applicable here also.

Nothing in Sections 24(8) and 24(9) restricts the power of the State Government to appoint Special Public Prosecutors in public interest. It can also refuse to appoint a Special Public Prosecutor in a particular case for sufficient reasons.[14] It may appoint a Special Public Prosecutor in a case and insist that he be paid by the victim or his dependants.[15]

3.8 Assistant Public Prosecutors

Section 25 makes provisions prescribing eligibility qualifications for being appointed as Assistant Public Prosecutor as well as provisions for the appointment of such prosecutors for conducting prosecutions in the Magistrates' Courts. The section read as follows:

Assistant Public

25. (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

13. *K.j. John* v. *State*
14. *Abdul Kkader Musliar* v.
15. *Phool Singh* v.

[16](i~A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.

(z) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

{3} Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be appointed—

{a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or *(b)* if he is below the rank of Inspector.

Although it is not expressly provided in the section that the Assistant Public Prosecutors should be legally qualified, it is hoped that the present trend of appointing, as far as possible, qualified legal practitioners as Assistant Public Prosecutors will be maintained in all States and that the provisions made in sub-section {3} above will be resorted to less and less in future years.[16 17]

The provisions contained in Sections 24 and 25 do not give an adequate idea as to the actual organisation of the prosecuting agency in the district or as to the hierarchy or the administrative control envisaged therein. Generally speaking the prosecution work in the Magistrates' Courts is under the directions of the Police Department, while the prosecution of trial in Sessions Courts is under the general control of the District Magistrate.[16 17 18] Here, it would be worthwhile to refer to the views expressed by the Law Commission in its 14th Report on the Reform of Judicial Administration:

> It has been suggested, and we see great usefulness in the suggestion, that the prosecuting agency should be separated from and made independent of its administrative counterpart, that is the Police Department, and that it should not only be responsible for the conduct of the prosecution in the court but it should also have the liberty of scrutinising the evidence particularly in serious and important cases, before the case is actually filed in court. Such a measure would ensure that the evidence in support of a case is carefully examined by a properly qualified authority before a case is instituted so as to justify the expenditure of public time and money on it. It would also ensure that the investigation is conducted on proper lines, that all the evidence needed for the establishment of the guilt of the accused has been obtained. The actual conduct of the prosecution by such an independent agency will result in a fairer and more impartial approach by the prosecutor of the case.[19]

16. *Itis.* by Code of Criminal Procedure {Amendment} Act, 1978, S. 9.
17. 41st Report, p. 312, para. 38.3.
18. 14th Report, VoL II, p. 766, para. 5.
19. *Ibid,* p. 770, para. 14.

The provisions of the new Code of 1973 have not gone far enough to adopt fully the suggestions made by the Law Commission. It is to be hoped that gradually administrative steps would be taken to make the suggested reforms a reality. It has been ruled that the appointment of Special Public Prosecutor and Assistant Public Prosecutor would not be violative of Article 14 of the Indian Constitution.[20]

The hopes entertained by the Law Commission seem to have been belied. The State Governments in India still seem to follow the spoils system in appointing District Counsels/Public Prosecutors. This unhappy position has been disapproved by the Supreme Court which ruled that having regard to the provisions in Sections 21, 24, 25, 321 etc. of the Code, the functions of Public Prosecutors invest them with the attributes of holders of public office and hence their appointment cannot be terminated arbitrarily.[21]

The retention of Assistant Public Prosecutors as part of the Police Establishment in Maharashtra has been disapproved by the Supreme Court. The State has been directed to have a separate cadre of Assistant Public Prosecutors independent of the Police Department.[22]

In this context it is interesting to note that the appointment of a Senior Police Officer as head of the prosecution agency in the State of Haryana was disapproved by the Punjab and Haryana High Court.[23]

The Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005) after giving wider meaning to the terms “regular cadre of prosecuting officers” and “prosecuting officer” with retrospective effect from 18 December 1978 enacts that the State Government might establish Directorate of Prosecution consisting of Director of Prosecution and as many Deputy Directors of Prosecution as the State thinks fit.

A hierarchical set-up of prosecution system with Director Prosecution at the top, Deputy Directors below him and Public Prosecutors, Additional Public Prosecutors, Special Prosecutor at High Court and District Courts has been envisaged. The Director of prosecution shall function under the head of the Home Department in the State. The powers and functions of the Director and Deputy Directors and the areas for which each Deputy Director have been appointed shall be specified by the State Government.[24]

The Appointment of a Senior Police Officer as head of the prosecution agency in the State came to be severely criticised by the judiciary.[25]

20. *Vijay* v.
21. *Shrilekha Vidyarthi*
22. *S.B.*
23. See,
24. See, S. 25-A *ins,* by S. 4, Code of Criminal Procedure
25. *Krishan Singh Kundn* v. *State of Haryana,* 1989 Cri LJ 1309

The role of the Prosecutor 3.9

The Code does not specifically mention about the spirit in which the duties of the prosecutor are to be discharged. It does not speak of the attitude the prosecutor should adopt while conducting the prosecution. Probably it might have been thought to be too obvious to require any specific mention in the Code. Whatever that may be, the principles in this regard are well-settled. The object of a criminal trial is to find out the truth and to determine the guilt or innocence of the accused. The duty of the prosecutor in such a trial is not merely to secure conviction at all costs but to place before the court whatever evidence is possessed by the prosecutor, whether it be in favour of or against the accused, and to leave the court to decide upon all such evidence—whether the accused was or was not guilty of the offence alleged.[26] There should not be on the part of the prosecutor "any unseemly eagerness for or grasping at conviction".[27] It is no part of the prosecutor's duty to obtain convictions by hook or by crook. The prosecutor plays a very important role in the administration of justice. "The last thing he would desire is to secure a wrongful conviction or even to secure a conviction in a doubtful case." "A Public Prosecutor should be personally indifferent to the result of the case. His duty should consist only in placing all the available evidence irrespective of the fact whether it goes against the accused or helps him, before the court, in order to aid the court in discovering the truth. It would thus be seen that in the machinery of justice a Public Prosecutor has to play a very responsible role; the impartiality of his conduct is as vital as the impartiality of the court itself."[28]

TABLE 5: Prosecutors

Designation Prosecutor	₀f Court	Qualifications	Appointing authority	Other matters
1	1	3	4	5
1. Public r, , Court Prosecutor	High	Advocate in practice for seven years or more	State Government Centra! Government,	Appointment to be or made after consultation with High Court. as

26. *Ghirrao* v. *Emperor,*
27. *Anant Wasitdeo Chandekar* v. *King Emperor,* AIR 1924 Nag 243, 245.
28. 14th Report, Vo!. II, p. 765, para. 2. *Also see* observations in *Mohd.*

(con id.)

	Designation of Prosecutor	Court	Qualifications	Appointing authority	Other matters
2.	Additional Publ'tc Prosecutor	-do-	-do-	-do-	-do-
3.	Public Prosecutor	Sessions Court	for district (local	-do-	-do- The Advocate to be appointed by the State Government as Public Prosecutor must be one of the Advocate's on the panel prepared by the District Magistrate in consultation with the Sessions Judge. However, in case of appointment by a State in which regular cadre of Prosecuting Officers exists, the appointment shall normally be made from among persons constituting the Cadre.
4.	Additional Prosecut e r(s} Special Public Prosecutor(s)	-do-	Public Advocate in ten	-do-	
5.		Any court		-do-	Appointment is to be made for the purpose of any case or class of cases.
			y ears or more ourts of	-do-	For the purpose of any particular case, if Assistant Public Prosecutor is not available, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor for the case. Such other person may be a police officer if (/) he has not taken part in the investigation of that offence, and *(if)* he is not

3.10 The Defence Counsel

According to Section 303, “any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice”. Unlike the other functionaries under the Code, such as the police and the prosecutors, the advocates and pleaders engaged in the task of defending the accused persons are not in the regular employment of the State and in

most of the cases they receive remuneration for their services from the accused persons. Nevertheless they are also the officers of the court and are quite indispensable if a fair trial is to be given to an accused person.

The adversary system of criminal trial, which we have adopted, assumes that the State using its investigative resources and employing a competent prosecutor would prosecute the accused, who, in turn, will employ equally competent defence counsel to challenge the evidence of the prosecution.[29] Therefore, both the Constitution of India and the Code confer on the accused person a right to consult and to be defended by a legal practitioner of his choice.[30] The right to counsel would, however, be of no use if the accused due to his poverty or indigent conditions has no means to engage a counsel for his defence. The indigent accused obviously stands the risk of denial of a fair trial when he does not have equal access to the legal services available to the opposite side. To an appreciable extent the Code has attempted to find a solution to this problem. Section 304 provides that where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State; and the section further empowers the State Government to extend the application of the above provision in relation to any class of trials before other courts in the State.

Further the Supreme Court through a process of constitutionalisation has held that the fundamental right to live implicitly requires the State to make provisions for grant of free legal services to an accused who is unable to engage a lawyer in account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that on conviction it would result in a sentence of imprisonment and is of such nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation.[31]

At present there are several schemes under which an indigent accused could get legal aid. The legal aid schemes of the State Governments, Bar Associations, Legal Aid and Advice Board, Supreme Court Senior Advocates' Free Legal Aid Society, etc., are in point. The Legal Services Authorities Act, 1987 also provides for legal aid to the needy. Judiciary has been given important role in implementing the provisions of this legislation.

29. Report of the Expert Committee on Legal Aid, p. 70.

30. Art. 2.2(1) of the Constitution and S. 303 of the Code.

31. *Kbatri (2}* v. *State of Bibar,* (1981) *1* SCC 627, 632: 19S1 SCC (Cri) 228: 1981 Cri Lj 470; *Sttk Das* v. *UT*

3.11 Prison authorities and correctional services personnel

As in the case of the police, the Code presupposes the existence of prisons and prison authorities. The Code empowers Magistrates and judges under certain circumstances to order detention of undertrial prisoners in jail during the pendency of the proceedings. The Code also empowers the courts to impose sentences of imprisonment on convicted persons and to send them to the prison authorities for the due execution of such sentences. If, at the conclusion of the trial, the accused is found guilty, the court shall pass a sentence on the offender unless it decides to deal with the offender under the probation laws.[32] Section 361 further directs the court that as far as possible the court should deal with the offender under Section 360 (regarding release of the offender on probation of good conduct or after admonition) or the provisions of the Probation of Offenders Act, 1958, or in case of youthful offenders, under the benevolent laws applicable to such offenders for their treatment, training or rehabilitation.

Therefore, it would become necessary to provide for the machinery and personnel for the execution of sentences and also for the rehabilitation and treatment of the offenders. The CrPC, however, does not make specific provisions for the creation, working and control of such machinery. These matters have been left to other special Acts, such as, the Prisons Act, 1894; the Prisoners Act, 1900; the Borstal School Acts; the Probation of Offenders Act, 1958; etc.

32. ***See***, Ss. 2.35(2.), 248(2}, 255(2).

Chapter ***4***

Pre-trial Proceedings—General Observations

Importance of fair trial 4.1

One principal object of criminal law is to protect society by punishing the offenders. However, justice and fair play require that no one be punished without a fair trial. A person might be under a thick cloud of suspicion of guilt, he might have been even caught red-handed, and yet he is not to be punished unless and until he is tried and adjudged to be guilty by a competent court. In the administration of justice it is of prime importance that justice should not only be done but must also appear to have been done. Further, it is one of the cardinal principles of criminal law that everyone is presumed to be innocent unless his guilt is proved beyond reasonable doubt in a trial before an impartial and competent court.

Therefore it becomes absolutely necessary that every person accused of crime is brought before the court for trial and that all the evidence appearing against him is made available to the court for deciding as to his guilt or innocence.

Initiation of criminal proceedings 4.2

Considering the above observations, now the questions would be: *a)* How and by whom is the accused person brought before the court for trial? *b)*

How and by whom is the evidence concerning the alleged crime and criminal collected and presented before the court? Usually the victims of the crime or the persons feeling offended or aggrieved by the crime, would be most likely to be interested in setting the criminal law in motion, justice and reason would suggest that such persons should not only be allowed but also be given all the facilities to move the machinery of law against

the alleged culprits. In fact, as it is in the general interests of society that the offenders are detected and punished, the legal system should encourage the citizens to invoke the legal process towards this end. According to the Criminal Procedure Code, 1973 (CrPC) *any person* can approach a competent judicial Magistrate and lodge a complaint with him regarding the commission of an offence.[1] The-Magistrate may then get the matter further investigated by the police, or, may have an inquiry made into the case with a view to ascertain whether there is sufficient ground for proceeding.[2] If in the opinion of the Magistrate there is sufficient ground for proceeding into the case, he would issue a summons or warrant for securing the attendance of the accused person for his trial.[3]

Here the criminal process is invoked at the instance of the victim of the crime or of any other person. The invocation is completely discretionary at the instance of such person. However if the process is once invoked, it is then the responsibility of the complainant to collect evidence and to produce it in court. This means that the complainant will have to spend his time and money for the conduct of the case. In many cases the complainant may not have the necessary means, nor the skill and capacity required for the job. Therefore this arrangement by itself will not be adequate to make the administration of criminal justice really effective.

There is, however, a special State agency exclusively devoted to the task of detection and prevention of crime. As mentioned earlier each State Government has established its own police force for this purpose. The police personnel are specially recruited and trained for this job. They are full-time government employees provided with all the equipment needed for their work. The CrPC has invested them with special powers of interrogation, arrest, search etc., so as to enable them to collect evidence and to bring the accused before the court expeditiously for trial.

4.3 Investigation of offences and the use of police force

Section 23, Police Act, 1861 provides:

> it shall be the duty of every police officer ... to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisance; to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient grounds exist;

Section 29 of the same Act also provides penalties for the neglect of such duties.

1. S. 190. See also. *Visbtua Mitter* v. O.f. *Poddar,* {1983) 4 SCC 701: 1984 SCC (Cri) 29: 1984 Cri LJ 1; A.ii.
2. S. 2.01.
3. S. Z04.

The CrPC, however, does not contemplate the use of the police in respect of investigation into each and every offence. The Code has classified all offences into two categories—*cognizable* and *non-cognizable*. Clauses *(c)* and (/) of Section *z* define "cognizable" and "non-cognizable" offences as follows:

Definitions

2. (c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

{1} "non-cognizable offence" means an offence for which, and "non-cogni- zable case" means a case in which, a police officer has no authority to arrest without warrant;

In case of a cognizable offence, a police officer can arrest the alleged culprit without warrant and can investigate into such a case without any orders or directions from a Magistrate.[4] The law not only allows the police officers to wield these powers but also enjoins them to exercise the same in respect of a cognizable case.[5] In case of a cognizable offence, it is the responsibility of the State (and the police) to bring the offender to justice.

Where the offence is not cognizable according to the First Schedule of the Code or it has not been made cognizable by the Act creating it, it would not be considered as cognizable simply on the ground that for the commission of such offence under certain circumstances the police is given the power to arrest without warrant.[6]

In case of a non-cognizable offence, generally speaking, a police officer cannot arrest without a warrant,[7] and secondly, such officer has neither the duty nor the power to investigate into such an offence without the authority given by a Judicial Magistrate.[8] Exceptions apart, the non-cognizable offences are considered more in the nature of private wrongs and therefore the collection of evidence and the prosecution of the offender are left to the initiative and efforts of private citizens. However, if a Judicial Magistrate considers it desirable that a non-cognizable case should be investigated into by the police, he can order the police to do so. In that case the police officer will have all the powers in respect of investigation (except the power to arrest without warrant) as he would have exercised if the case were a cognizable one.[9]

4. Ss. 156(1) and 157.
5. S. 157 of the Code, and Ss. 2,3 and 29, Police Act, 1861.
6. *State* o/W.B. v. *Jogindar MalUck,* 1979 Cri Lj 539, 541 (Cal).
7. Cl. {/) of S. 2; however, according to S. 4Z if a non-cognizable offence is committed in the presence of a police officer, and the person
8. S. 1*55(2) read with S. 3(1 *){a).*
9. Sub-ss. (z) and (3) of S. 155.

4*4 Basis of the distinction between cognizable and non-cognizable offences

It will be seen that the Code has not given any test or criterion to determine whether any particular offence is cognizable or non-cognizable. It all depends upon whether it is shown as cognizable or non-cognizable in the First Schedule of the Code. That schedule refers to all the offences under the Penal Code, i860 (IPC) and puts them into cognizable and non-cognizable categories. The analysis of the relevant provisions of the schedule would show that the basis of this categorisation rests on diverse considerations. 1) Generally speaking, all serious offences are considered as cognizable. The seriousness of the offence depends upon the maximum punishment provided for the offence. By and large, offences punishable with imprisonment for not less than three years are taken as serious offences and are made cognizable. In case of serious offences like murder, robbery, counterfeiting coins etc., prompt police action for the arrest of the offender and the investigation into the case is highly necessary for successful prosecution; therefore it is advisable to treat these offences as cognizable offences. 2) However, certain offences though serious according to the abovesaid criterion, have been considered as non-cognizable only. Offences relating to marriage (covered by Ss. 493-97 IPC) including bigamy and adultery are punishable with more than five years' imprisonment. However, they are more in the nature of private wrongs and making them cognizable might involve too much risk of police-intervention in the private family life of the individuals. Therefore, though these offences are serious in view of the maximum limits of punishments provided for them, still they have been put in the category of non-cognizable offences. 3} Chapter XI IPC deals with "False Evidence and Offences against Public Justice". Most of these offences including the offences of "giving or fabricating false evidence in judicial proceeding", causing disappearance of evidence etc., are punishable with imprisonment for more than three years and thus are undoubtedly serious. However, the First Schedule of the Code shows most of them as non-cognizable only. Probably it is apprehended that if these offences are made cognizable, that might create risk of police interference in the conduct of court proceedings in respect of which such offences are alleged to have been committed. Such police interference would not be quite a desirable position. 4) As a broad proposition it can be said that offences which are not serious and are punishable with less than three years' imprisonment are treated as non-cognizable offences. These offences are mostly in the nature of private wrongs, for example, ordinary cases of assault, intentional insult, simple hurt, defamation etc. 5) It may, however, be noted that certain offences which are not punishable with imprisonment for three years or more, and are not therefore considered serious, have been made cognizable. For instance, many of the offences covered by Chapter VIII IPC, "Offences against the Public

Tranquillity", are punishable with less than three years[5] imprisonment, yet, they have been made cognizable; so also the offence of negligently doing any act known to be likely to spread infection of any disease dangerous to life.

[Ss. 2.69-70 IPC] offence of defiling the water of a public spring etc., [S. 277 IPC] offence of dealing with any poisonous or explosive substance so as to endanger human life, [Ss. 284-86 IPC] the offence of uttering words or making gestures to insult the modesty of a woman [S. 509 IPC]—all these offences have been made cognizable even though the punishment provided for them is not of a severe type. The necessity of making prompt arrest of the offender is the probable reason for making these offences cognizable. It might also be, that it is not desirable to leave the pre-trial proceedings in the hands of private citizens in respect of such offences. 6} As it is not possible to list all offences under all the laws other than the IPC because some offences would be created by enacting new laws and it might be difficult to amend the Schedule every time such new law is passed—the First Schedule makes a general rule whereby all offences punishable with imprisonment for three years or more have been made cognizable and others non-cognizable. However, this rule can suitably be modified according to any particular need by making a specific provision in law and declaring a particular offence as cognizable or non- cognizable. For instance, offences under the Protection of Civil Rights Act, 1955, are all punishable with imprisonment up to six months or/and fine; however, all these offences have been made specifically cognizable by Section 15 of that Act.

Weakness of the classification in its present form 4.5

An offence is cognizable if it is shown as such in the First Schedule of the Code; and if it is so shown as cognizable, a police officer can arrest without warrant for such an offence.[10] A question may arise as to the advisability of having such arrangement for making arrest-decision. "It is usually assumed that judicial participation in decision-making is desirable in criminal justice system in order to ensure a fair balance between the interests of society and of the individual. [Therefore] ... in the absence of any need for immediate action the normal and desirable method for determining whom to arrest is by the police presenting the facts to a Magistrate who is removed from the combative task of detecting crime and bringing about the arrest of the offenders."[11] The "cogmzable"-"non-cogmzable[55] classification as given in the First Schedule either presupposes the need of immediate action in respect of *every* cognizable offence, or otherwise it considers unnecessary in all cognizable cases to have the arrest-decision be made by a "neutral and detached" judicial officer. In either case it

10. Cl. *(c)* of S. 2, and Explanatory Note (2} given at the outset of the First

11. La Fave, *Arrest: The Decision to Take a Suspect into Custody* {1965} 8.

is not quite fully defensible. Moreover the present arrangement presupposes that every police officer knows by heart the provisions of the First Schedule and the provisions of other laws that make hundreds of offences as cognizable or otherwise. This is obviously assuming too much. The same classification has also been used to determine the power of the police to investigate into a case without any specific authority given by a judicial Magistrate. The element has also to an extent contributed to the irrationality of the classification in its present form, and has made it functionally less suitable.

The present "cognizable"-"non-cognizable" classification of offences is apparently and essentially intended to indicate as to whether the arrest in respect of an offence can be made with or without a warrant.[12] But the same classification has been pressed into service to determine whether the police should or should not have the power to initiate investigation without any order from the Magistrate or to take preventive action.[13] This has unwittingly led to some undesirable consequences. In respect of many social reform laws where the offences are mostly punishable with less than three years' imprisonment and therefore non-cognizable, there is practically no enforcement as the police are not supposed to take any initiative in such cases. If therefore such offences are expressly made cognizable with a view to have better implementation of such laws, the police automatically get wide powers to make arrests without warrant. Giving of such wide powers to the police is often considered undesirable because of the apprehension of too much police-interference in the sensitive social reform areas. Therefore the dilemma caused by the use of the same classification for two divergent purposes continues to haunt the legislative policy-makers. In this context, it is worth taking note of an innovation apparently Intended to overcome this dilemma by making certain non- cognizable offences as cognizable, only for the purposes of investigation and prevention of such offences but without giving the police the power to arrest without a warrant. Certain amendments have been made in the Child Marriage Restraint Act, 1929 by the Child Marriage Restraint (Amendment) Act, 1978. This Amending Act provided for the Insertion of a new section, *viz.* Section 7 in the Parent Act. The new section is as follows:

> 7. *Offences to be cognizable for certain purposes.*—**The Criminal Procedure** Code, 1973 (2. of 1974), shall apply to offences under this Act as If they were cognizable offences—
>
> *(a)* for the purpose of investigation of such offences; and

12. *See,* ds. (c) and {/} of S. 24 *see supra,* para. 4.3.

13. So far as investigation is concerned *see,* Ss. 155(2.], 156(1), 157 and Ss. 2.3 and 29, Police

(/?) for the purposes of matters other than (i) matters referred to in Section 42 of that Code, and *{ii)* the arrest of a person without a warrant or without an order of a Magistrate,

This innovation though somewhat clumsy in its form might stimulate in the future better formulations for functionally more suitable classifications of offences.

It seems that now the trend is to make serious offences cognizable irrespective of the punishments carried by them. For example, in Criminal Law (Amendment) Act, 2013, except the newly created offence under Section 166-B (non-treatment of victim by hospital) all other offences such as rape, stalking voyeurism, trafficking, hurt by acid etc. etc. have been made cognizable.

The offences of sexual intercourse by husband upon his wife during separation, under Section 376-B and sexual intercourse by a person in authority under Section 376-C have been shown in column 4 of Schedule I as follows:

Offence	
376-B	Cognizable {only on the complaint of the victim)
376-C	Cognizable

This is one more instance of the innovations in the traditional categorisation of offences into cognizable and non-cognizable offences. The offence under Section 376-B here has been made cognizable only on the complaint of the wife. Thus it lacks in this respect the essential attribute of a cognizable offence.

There is yet another instance where the traditional rigid categorisation of offences into cognizable and non-cognizable has been modified in a pragmatic manner to subserve the needs of the particular situation.

The offence under Section 498-A created by the Criminal Law {2nd Amendment) Act, 1983 has specifically been made cognizable only if the information is given to the police officer by the persons mentioned in Section 198-A. Thus the offence under Section 498-A is placed in between the two categories of cognizable and non-cognizable offences,[14]

Duty of public to give information of certain offences 4.6

Generally speaking, it should be the duty of every citizen to report to the authorities any crime which he knows to have been committed. This would considerably facilitate the detection of crime and enable the authorities to

14. See, *State of Orissa* v. *Sharat Chandra Sahu,* {1996) 6 SCC 435: 1996 SCC (Cri) 1387: AIR .1997 SC 1: *T.C. Prasad* v. *Circle Inspector of Police,* 1998 Cri Lj 3900 (Ker) treating the offence under S. 498-A IPC cognizable. Though at first the complaint came to be submitted to the Magistrate, the Magistrates referred it to the police under S. 156(3) as if it was a cognizable offence. This was approved by the Kerala High Court.

Public to give information of certain offences

combat crime more effectively. However, it is obviously neither necessary nor advisable to insist on such a duty in case of very minor offences. It is not, at the same time, quite easy to suggest precisely in respect of what offences such a duty should be imposed. The scope of such duty in relation to the number and nature of offences has varied from time to time.[15] [16] Section 39 of the Code provides:

39. (x) Every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code {45 of i860), namely:—

(/) Sections 121 to 126, both inclusive, and Section 130 {that is to say, offences against the State specified in Chapter VI of the said Code);

(n) Sections 143, 144,145,147 and 148 {that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);

{Hi) Sections *161* to 165-A, both inclusive {that is to say, offences relating to illegal gratification);

(tv) Sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);

(v) Sections 302, 303 and 304 {that is to say, offences affecting life); Sections 364-A (that is to say, offence relating to kidnapping for ransom, etc.};]

Section 382 (that is to say, offence of theft after preparation made for causing death, hurt or restraint in order to the committing of the theft);

ivii) Sections 392 to 399, both inclusive, and Section 402 (that is to say, offences of robbery and dacoity};

{viii) Section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);

(ix) Sections 431 to 439, both inclusive (that is to say, offences of mischief against property);

Sections 449 and 450 {that is to say, offence of house-trespass);

(xi) Sections 456 to 460, both inclusive (that is to say, offences of lurking house-trespass); and

(xii) Sections 4S9-A to 489-E, both inclusive (that is to say, of fences relating to currency notes and bank notes);

shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention.

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of India which would constitute an offence if committed in India.

In this section the duty to inform is not confined in relation to the specific offences committed in India. Sub-section (2) makes it clear that the duty extends to even in respect of acts committed outside India, provided such

15. **This will be seen from the relevant provisions of the Criminal Procedure Codes of 1861, 1872, 1882, 1898 and the present one**

16. **7ns. by Act 42 of *993, S. 3.**

acts if committed in India would constitute such offences. This might be particularly helpful as a precautionary measure in keeping close watch on persons indulging in criminal activities in the neighbouring countries.

Though the section is very wide in its import, the courts have put reasonable restrictions on its application. The section requires *every* person to give information to the police etc. However, the words "every person" can not be taken to include a person committing or intending to commit an offence.[1ı] When the police have already secured information about the offence, the section is not to be invoked against any person who omits to give information thereafter.[17] [18]

A person is exempted from the duty to inform if he has reasonable excuse for not giving information. However, the burden of proving the existence of such excuse is on the person claiming such exemption. This Is justifiable as ordinarily he alone will be aware of the existence of an excuse.

Intentional omission to give information under this section is punishable under Sections 176 and 202 IPC.

In case of non-cognizable offences, the police are not expected to Investigate without the order of a Judicial Magistrate, and yet this section requires the giving of information to the police in respect of non-cognizable offences punishable under Sections 272 to 276, 278 *(i.e.* offences relating to adulteration of food and drugs etc.) and Section 434 (mischief by destroying or moving etc. a landmark). These sections were added for the first time in this Code. It is not easy to understand the practical utility of the reporting requirement in respect of such non-cognizable offences.

Despite the wide sweep of Section 39 and despite the penal sanctions provided by Sections 176 and 202 IPC, it is common experience that neither the police nor the public attach adequate importance to the implementation of the section.[19]

Duty of village-officers and village-residents to make certain reports 4.7

While Section 39 has created a duty on the part of the public generally to give information to the police regarding certain offences, Section 40 casts in addition a duty on village-officers and village-residents to report certain matters to the police or Magistrates. This is necessary because most of the villages are not within easy reach of the police station having

17. *Malladea Nath* v. *Emperor,* AIR 1941 Pat 550, 55S.
18. *Pandya Nayak, re*7 ILR (1883) 7 Mad 436. The case was actually under S. 40 read with S. 176 IPC; *Empress* v. *Sashi Bhusan,* ILR (1879) 4 Cai 623; *Queen Empress* v. *Copal Singh,* ILR (1893) 20 Cai 316; *Bhagwantrao* v.

1P. *See,* obse rvations of Anant Singh J. in *Ram Balak Singh* v. *State,* AIR 1964 Pat *6z,* 65. But see, *Bhagwan Swamp* v. *State of Rajasthan,* (1991) 4 SCO 514: 1992 SCC (Cri) 27: 1991 Cri LJ 3123 wherein the accused was

jurisdiction over the villages. The proper implementation of Section 40 would enable the police to take prompt action for the prevention, detection and investigation of crime in far-flung village areas. Section 40 of the Code provides as follows:

Duty of officers employed in connection with the affairs of a milage to make certain report

40. (1) Every officer employed in connection with the affairs of a village and every person residing in a village shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station, whichever is nearer, any information which he may possess respecting—

(a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in or near such village;

{,b} the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

(c) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under Sections 143, Section 144, Section 145, Section 147, or Section 148 of the Indian Penal Code (45 of i860};

{d} the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person;

(e) the commission of, or intention to commit, at any place out of India near such village any act which, if committed in India, would be an offence punishable under any of the following sections of the Indian Penal Code (45 of i860), namely, 231 to 238 (both inclusive), 302, 304, 382, 392 to 399 (both inclusive), 402, 435, 436, 449, 450, 457 to 460 (both inclusive), 489-A, 489-B, 489-C and 489-D;

(f) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the State Government, has directed him to communicate information.

(2) In this section,—

(f) "village" includes village-lands;

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority in any territory in India to which this Code does not extend, in respect of any act which if committed in the territories to which this Code extends, would be an offence punishable under any of the following sections of the Indian Penal Code (45 of i860), namely, 302, 304, 382, 392 to 399 (both inclusive), 402, 435, 436, 449, 450 and 457 to 460 (both inclusive);

(iii) the words "officer employed in connection with the affairs of the village" means a member of the panchayat of the village and

to perform any function connected with the administration of the village.

A "proclaimed offender" referred to in clause *(b)* of sub-section (i) means a person alleged to be absconding in respect of whom a proclamation under Section 82 has been published by a court with a view to secure his appearance.

The discussion regarding Section 39 above is also applicable *mutatis mutandis* in case of Section 40, and the intentional omission to give information as required by Section 40 has also been made punishable under Sections 176 and 202 IPC.

Public to assist Magistrate and police 4.8

While Sections 39 and 40 require private citizens to give information to the police etc. of their own, Section 37 requires every private citizen to give reasonable assistance to the magistrates and police under certain circumstances if such assistance is demanded by a Magistrate or police. Section 37 is as follows:

37. Every person is bound to assist a Magistrate or police officer reasonably demanding his aid— *Public when to assist Magistrate and Police*

{a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest; or *{b)* in the prevention or suppression of a breach of the peace; or *(c)* in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

The words "reasonably demanding" are important. What is a reasonable demand is a question of fact depending upon the circumstances of each case.

It has been held that the police have got no general power of calling upon the members of the public to join them in arresting a number of unknown persons whose whereabouts were not known.[20] The assistance contemplated by the section is the personal assistance of the person of whom it is demanded; and it must be only of the kind specified in the section.

Intentional omission to assist in accordance with the provisions of Section 37 is punishable under Section 187 IPC.

20. *Emperor v.Joti Prasad,* ILR (192.0) 42. All 314.

Chapter 5

Pre-trial Procedure: Steps to Ensure Accused's Presence at the Trial

Importance of procuring accused’s presence at trial 5.1

Fair trial requires that the trial proceedings are conducted in the presence of the accused and that he is given a fair chance to defend himself. Further, in case the accused is found guilty at the conclusion of the trial, he must be available in person to receive the sentence passed on him.

The presence of the accused at the trial can well be ensured by simply arresting and detaining him during trial. However, this course, though apparently simple and expedient, should not be resorted to in every case.

It may be stated as a broad principle that the liberty of a person should not be taken away without just cause. If the presence of the accused at the trial cannot be procured except by arrest and detention, the accused should by ail means be arrested and detained pending his trial; however, if his presence can be reasonably ensured otherwise than by his arrest and detention, the law ought not to deprive him of his liberty. Moreover, the detention of the accused prior to or pending trial is likely to cause direct or indirect obstructions in the preparation of his defence and would not therefore be quite conducive to a fair trial. Consequently, the provisions regarding the issue of a summons, or of a warrant of arrest, and the provisions relating to arrest without warrant (or for that matter even provisions regarding release of the arrested accused on bail} are all aimed at ensuring the presence of the accused at his trial without *unreasonably* depriving him of his liberty.

5.2 How to procure the presence of the accused at the trial

The Code contemplates mainly of two methods of procuring the attendance of the accused at his trial, *i.e.* either by issuing a summons to him, or by his arrest and detention. Broadly speaking, whether one method is to be preferred to the other in a given case is essentially a decision to be taken by a judicial Officer. The judicial discretion in this matter is however guided, and to an extent controlled, by the provisions of the Code.

The Code classifies all criminal cases into summons cases and warrant cases. A "warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years;[1] and a "summons case" means a case relating to an offence, and not being a warrant case.[2] Obviously the basis of the classification is the seriousness of the offence to which the case relates. A warrant case relates to a serious offence while a summons case relates to a comparatively less serious crime. Therefore the trial-procedure prescribed for a warrant case is much more elaborate than that provided for summons case.[3]

The same classification based on the seriousness of the crime has been used to make the initial decision as to whether the accused is to be summoned to attend his trial or whether he is to be arrested and detained for the trial. In a summons case, the consequences of the trial being less serious to the accused than those in a warrant case, it is relatively less probable that he would abscond and disobey the summons issued to him to attend his trial. This is particularly so as the intentional omission to attend the court in obedience to a summons has been made an offence punishable under Section 174, Penal Code, i860 (IPC) with six months' imprisonment. On the other hand, if the offence with which the accused is charged is punishable with severe punishment (as in a warrant case) the risk of the accused not obeying the summons and of absconding is greater. The Code therefore gives the general direction that in a summons case a summons is to be issued to the accused in the first instance and in a warrant case a warrant of arrest is normally to be issued for the arrest of the accused. The Code, however, gives discretion to the Judicial Officer to depart from this general rule if the circumstances $0 demand in a particular case. The relevant provisions in this connection are contained in Section 204 and Section 87 which are as follows:

Issue of process

204. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—

(a) a summons case, he shall issue his summons for the attendance of the accused, or

(b) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a cerrain time

1. Ci. (x) of S. 2.
2. Ci. *iw)* of S. 2.
3. *See,* the provisions of Chaps. XIX and XX, and Ss. 274, 275 and 27S of the

before such Magistrate or (if he has no jurisdiction himself) some other
Magistrate having jurisdiction.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87.

Issue of warrant in lieu of, or in addition to, summons

87. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest—

(1a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

{<b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

It will be seen from Section 204(1) that while in a summons case the Magistrate concerned ***shall*** issue a summons, in a warrant case he ***may*** issue a warrant ***or*** (if he thinks fit) a summons. This is further indicated by Section 87 which, while empowering a court to issue a warrant in lieu of, or in addition to summons in certain circumstances, requires the court to record reasons for doing so.

Questions may arise as to whether failure to record reasons would vitiate the warrant and make the consequent arrest illegal.[4 5] Even if one takes the view that the provision in Section 87 for recording reasons is only directory and not mandatory, the object of this requirement is quite obvious. It is "to draw attention to the consideration that a warrant ought not to be issued where a summons can serve the purpose, and that care should be exercised by the court to satisfy itself that upon the materials before it, it was necessary to issue a warrant".[3]

Summons to the accused and its service

5.3

(a) Meaning and form,—A summons in case of an accused person is an authoritative call to the accused person to appear in court to answer to a charge of an offence. The manner in which a summons is to be prepared is described in Section 61, which is as follows:

Form of summons

61. Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court. [4 5]

4. ***Kurutkan, re,*** ILR {1915) 58 Mad 1088; ***Ind***

5. 37th Repo rt p . 3, para. 237.

The prescribed form—Form i of the Second Schedule—in which a summons to an accused person is ordinarily issued is as given below:

FORM NO. 1

[See, Section 61]

sUMMONS TO AN ACCUSED PERSON

To *f;name of accused)* of *{address).*

Whereas your attendance is necessary to answer to a charge of ***(state shortly the offence charged),*** you are hereby required to appear in person (or by pleader, ***as the case may be)*** before the ***{Magistrate)*** of _____ , on the _____ day of _____. Herein fail not.

Dated, this_____ day of_____ , ***zo*** _____.

{Seal of the Court) *(Signature)*

The above form indicates that the court issuing the summons *may* permit the accused to appear by his lawyer. This is in accordance with Section 205(1) which says:

205. (r) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. ...

Magistrate may dispense with personal attendance of accused

The summons issued to the accused should contain adequate particulars of the offence charged *i.e.* the day and time when, and the place where the alleged offence was committed. If these details are not given in the summons it can be disregarded; and if any further proceedings are taken thereon, and are objected to by the accused, such proceedings would be considered as invalid/

(b) Mode of service.—Sections 62 to 67 provide for different modes of effecting the service of the summons in diverse situations and conditions. Those sections are as follows:

62. (1) Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

Summons how served

{2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(3) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

63. Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the chief officer of the corporation in India, in which case the service shall be deemed to have been effected when

Service of summons on corporate bodies and societies

. 1 1 .. 1 1 •• !• *r* .6 [6]

Explanation.—In this section, "corporation" means an Incorporated company or other body corporate and includes a society registered under the Societies Registration Act, i860 (2.1 of i860).

The Branch Manager is a local manager and if he has been served, the service, shall be deemed to have been effected on the company itself.[7] [8]

Sendee when persons summoned cannot be found

64. Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Explanation.—A servant is not a member of the family within the meaning of this section.

Procedure when service cannot be effected as before, provided

65. If service cannot by the exercise of due diligence be effected as provided in Sections 62, Section 63 or Section 64, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper.

A strict construction of this section may mean that the second part of the section cannot be applied unless the affixture mentioned in the first part is attempted or made. According to the Kerala High Court such a restricted construction was not warranted. In case of a person not "ordinarily residing" in India and actually working abroad, service of summons under Section 62 or 64, or first part of Section 65 is not possible. But by construing liberally the second part of Section 65 and exercising the very wide discretion given by the words "order fresh service in such manner as it considers proper", the court could utilise that part of the section for service of summons in the abovementioned contingency. In deciding as to what is the proper manner of service under the second part of Section 65, the court is not fettered by the limitations found in Section 62(1), and the court can seek assistance of public servants working in Indian Embassies abroad in serving summons on a person actually working abroad.®

Service on Government servant

66. (1) Where the person summoned is in the active service of the Government, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in the manner provided by Section 62, and shall return it to the Court under his signature with the endorsement required

Service of summons outside local limits

7. *Central Bank of India* v. DD/L 1981 Cri LJ 1476 (Dei).
8. *E. Chaihu* v. *P. Gopalan,* 1981 Cri LJ 691 (Ker).

duplicate to a Magistrate within whose local jurisdiction the person summoned resides, or is, to be there served.

{c) Proof of service in particular cases.—In cases where the summons is served outside the jurisdiction of the court issuing the summons, or in cases where the serving officer is not present at the hearing of the case, a special procedure for proving the service of summons in such cases is provided by Section 68 with a view to avoid delay that might be caused in pursuing the normal mode of proving service of summons. Section 68 is as follows:

Proof of service in such cases and when serving officer not present

> 68. (x) When a summons issued by a Court is served outside its local jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in the manner provided by Section 6z or Section 64) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.
>
> *(a)* The affidavit mentioned in this section may be attached to the duplicate copy of the summons and returned to the Court.

Service of summons could be effected by Registered Post and in case of refusal to accept, an endorsement of the postal authorities that the person did not accept it, should be taken as valid service.[9]

5.4 Arrest with or without a warrant

As mentioned earlier a Magistrate taking cognizance of an offence can issue a warrant for the arrest of the accused as provided by Section 204 read with Section 87. Arrest probably is the most effective method of securing the attendance of the accused at his trial though for other reasons it is not quite desirable to use it in each and every case.

Arrest may be necessary not only for the purpose of securing the attendance of the accused at the time of trial, but it may become necessary as a preventive or precautionary measure in respect of a person intending to commit a cognizable offence, or a habitual offender or an ex-convict, or a person found under suspicious circumstances. [;see, Ss. 151, 41(2) read with Ss. no, 41(1 *){h),* 4i(i)(b), *A i{i){ba)* and (d)] Arrest may sometimes become necessary for obtaining the correct name and address of a person committing a non-cognizable offence. [S. 42] A person obstructing a police officer in discharge of his duties is liable to be arrested to put a stop to such obstruction [S. 4i{i)(e)j. So also a person escaping from lawful custody is liable to be arrested and re-taken in custody.

Arrest means apprehension of a person by legal authority resulting in deprivation of his liberty. The Code contemplates two types of arrests:

9. *K. Ramesh Ba'ou* v. *State of Karnat*

(a) arrest made in pursuance of a warrant issued by a Magistrate; and

(b) arrest made without such warrant but made in accordance with some legal provision permitting such arrest.

A *warrant of arrest* is a written order issued and signed by a Magistrate and addressed to a police officer or some other person specially named, and commanding him to arrest the body of the accused person named in it.

The decision to issue or not to issue a warrant involves a balancing of social interests with those of the individual accused. If the accused person is likely to abscond and disobey a summons, social interests would demand that he be arrested and detained so that he can be effectively put on his trial. On the other hand, the accused person would claim that he should not be subjected to arrest and detention before his guilt is established in a fair trial. The Code rightly assumes that these conflicting claims can be best settled if the decision regarding arrest is made by a judge—the judge being a person known for his ability and impartiality.

In case of arrests without warrant the decision to make arrest is no doubt made by persons other than magistrates and courts *i.e.* by police officers, private citizens, etc. These persons may not have the judicious mind and detached outlook, and yet because of the exigencies of certain situations the Code allows them to make the arrest-decisions themselves without obtaining warrants of arrest from the Magistrates. In a case where a serious crime has been perpetrated by a dangerous person and there is every chance of the person absconding unless immediately arrested, it would be certainly unwise to insist on the arrest being made only after obtaining a warrant from a Magistrate, Preventive action may sometimes be necessary in order to avert the danger of sudden outbreak of crime, and *immediate* arrest of the trouble-maker may be an important step in such preventive action.

Sometimes, the police officer may not arrest the main accused due to influence, even though his co-accused might be arrested. The Delhi High Court in such a case opined that the discretion of the investigating agency to arrest does not mean whim, fancy or wholly arbitrary exercise of discretion.[10] Sometimes the police denies the arrest to enable him to keep the accused in his custody for investigation. In such cases on complaint the Magistrate can make inquiry and pass appropriate orders.[11]

Though the Code allows a person to be arrested without warrant under certain circumstances, it does not allow such arrested person to remain in custody for more than 24 hours from the time of arrest. Further detention

10. *Binoy Jacob* v. *CBI,* 1993 Cri LJ 12.93 (Del).

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of the arrested persons shall be illegal unless permitted by a competent judicial Magistrate.[12]

If the arrested person is prepared to give security for his attendance in court for his trial, he might be released on bail under certain circumstances. These matters would be discussed in detail in the succeeding paragraphs.

5.5

Form and contents of a warrant of arrest

A warrant of arrest is written authority given by a competent Magistrate for the arrest of a person. The warrant of arrest must be in writing and must have been signed and sealed by a Magistrate or court. It must clearly mention the name and other particulars of the person to be arrested and must specify the offence with which he is charged. The warrant must necessarily show clearly the person to whom the authority to arrest has been given. The warrant of arrest may also include a direction that if the person arrested under the warrant executes a bond and gives security for his attendance in court, he shall be released. A warrant with such direction is commonly called a "bailable warrant of arrest".

These matters have been provided by Sections 70 to 73 which are as follows:

Form of warrant of arrest and duration

jo. {1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2.) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Power to direct security to be taken

71. {1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

{a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

Warrants to whom directed

72. {1} A warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same.

(2} When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.

12. This is in fact a fundamental right guaranteed to all persons in India by Art. 22(2) of the Constitution of India.

Warrant may be directed to any person

73. (1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailahle offence and is evading arrest.

{2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under Section 71.

It is obvious from the above provisions that the Code does not contemplate the issue of a general warrant of arrest *i.e.* a warrant to arrest all persons committing a particular offence or offences, and it would be illegal to issue such a general warrant.

Under Section 73 it is possible for the investigating agency to procure the presence of an accused evading arrest by way of a warrant issued by a Magistrate and the Magistrate can require him to be available for investigation.[13]

A warrant of arrest remains in force till it is executed, or cancelled by the court issuing it. Accordingly it has been held that it would not be invalid simply on the expiry of the date fixed by the court for the return of the warrant.[14]

A "bailable" warrant can be issued both in case of bailable and non-bailable offences. If the non-baliable offence is only of a technical nature, then in case of such an offence it would be appropriate to issue a "bailable warrant".[15]

A form of warrant of arrest has been prescribed in the Second Schedule as Form No. *z* which reads as follows:

FORM NO. 2

[See, Section 70]

wARRANT OF ARREST

To *(name and designation of the person or persons who is or are to execute the warrant).*

Whereas *{name of accused)* of *(address}* stands charged with the offence of (state the offence), you are hereby directed to arrest the said _____ , and to produce him before me. Herein fail not.

Dated, this day of , 20

{Seal of the Court) *(Signature)*

13.

14. *Emperor* v. *Binda Ahir,* (1928) 29 Cri LJ 1007, 1008 (Pat).
15. *Manila Sidda Sivamulu* v. *Emperor,* (1911) 12 Cri Lj 430 {Mad).

[See, Section 71]

This warrant may be endorsed as follows:—

If the said _____ shall give bail himself in the sum of rupees _____ with one surety in the sum of rupees _____ (or two sureties each in the sum of rupees _____) to attend before me on the day of _____ and to continue so

Dated, this' '____ '_____' day of__ _____ h_, 2.0 '_____' d

{Seal of the Court) *(Signature}*

5.6 Mode of execution of a warrant of arrest

A warrant directed to any police officer can also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed. [S. 74] However, this rule will not control the special procedure provided by Sections 78 to 81 for the execution of warrants outside the local jurisdiction of the court issuing the same. A warrant of arrest can be executed at any place in India. [S. 77] When a warrant of arrest is to be executed outside the local jurisdiction of the court issuing it, the procedure laid down in Sections 78 to 81 shall be followed. These sections are as given below:

Warrant forwarded for execution outside jurisdiction

78. {1} When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction it is to be executed; and the Executive Magistrate or District Superintendent or Commissioner shall endorse his name thereon, and if practicable, cause it to be executed in the manner hereinbefore provided.

(2.) The Court issuing a warrant under sub-section (1) shall forward, along with the warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Court acting under Section 81 to decide whether bail should or should not be granted to the person.

Warrant directed to police officer for execution outside jurisdiction

79. (1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer in charge of a police station, within the local limits of w[r]hose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.

(3} Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within whose local jurisdiction the warrant is to be executed will prevent such execution, the police- officer to whom it is directed may execute the same without such endorsement in any place beyond the local jurisdiction of the Court which issued it

Procedure of arrest of person against whom warrant issued

So. When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometres of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest w-as made, or unless security is taken under Section 71, be taken before such Magistrate or District Superintendent or Commissioner.

Procedure by Magistrate before whom such person arrested is brought

81. (1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under Section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:

Provided further that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of Section 437), or the Sessions Judge of the district in which the arrest is made on consideration of the information and the documents referred to in sub-section (z) of Section 78, to release such person on bail.

(z) Nothing in this section shall be deemed to prevent a police officer from taking security under Section 71.

The Supreme Court has had an opportunity[16] to deal with a case in which an advocate came to be arrested though the warrant against him was cancelled but he failed to produce documentary evidence of the cancellation of the warrant to the arresting authority. The Supreme Court rejected his prayer for enhancement of compensation. But it ruled that merely because the warrant used the expressions like "non-bailable" it cannot render the 0warrant bad in law. The court further suggested that the High Courts should ensure maintenance of records by the subordinate courts. Instructions have been issued and a format of register has been suggested as follows:

S. No.	The number printed on the form	Case title and particulars	Name and particulars o persons against whom warrant of arrest is issu	The officer to whom directed	Date of order directing arrest warrant	Date of issue	Date of cancellation if any	Due date of return	O

16. *Kaghin-ansh Dewanchand B ha sin*

A question arose as to whether the second proviso to Section 8i envisages the grant of bail by the Chief Judicial Magistrate or the Court of Sessions having jurisdiction over the place of arrest to a person arrested by the police without warrant.[17] The Delhi High Court answered it in the negative observing thus:

... it is obvious that in the context of Sections 78(2) and 81 the law has not chosen to give any such enabling power to grant bail to Courts other than one having jurisdiction over the area of the commission of the offence.[18]

5.7 Duty and right to assist in the execution of a warrant of arrest

As provided by Section 37, every person is bound to assist a police officer reasonably demanding his aid in arresting or preventing the escape of any other person whom such police officer is authorised to arrest.[19] Further Section 38 empowers a private citizen to assist a person other than a police officer in the execution of a warrant directed to such a person. The section reads as follows:

Aid to person, other than police officer, executing warrant

38. When a warrant is directed to a person other than a police officer, any person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

The assistance given in accordance with Sections 37 and 38 being lawful, no civil or criminal proceeding could lie against the person rendering such assistance.

Arrest without warrant

As maintained earlier, the exigencies of the circumstances may require a person to be arrested without warrant if such person is reasonably suspected to have committed a serious (cognizable) offence. Even in case of a less serious crime (non-cognizable offence) immediate arrest without warrant may become necessary to ascertain the name and address of the offender perpetrating the crime. It may also be necessary as a preventive measure to make arrests without warrant for the forestalling of impending crimes, and for enabling the police to discharge their duties effectively. Arrests without warrant can be made by police officers or even by private citizens in emergencies.

Wide powers have been conferred on the police for making arrests without warrant under circumstances mentioned in Sections 41 and 4a. These sections read as follows:

17. *Anm Kumar Singh* v. *State {NCT of Delhi),* 1999 Cri LJ 4021 (Del).
18. *Ibid,* 4024.
19. *Supra,* para. 4.8.

41* {1) Any police officer may without an order from a Magistrate and without *When police may* a warrant, arrest any person— *arrest with*

(a) who commits, in the presence of a police officer, a cognizable offence;

{b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely—

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

{ii) the police office is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

{c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

{d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

{e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing.

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

(Eba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years wdiether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;][20]

{c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or (<?) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or *if)* who is reasonably suspected "of being a deserter from any of the Armed Forces of the Union; or

20.

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who being a released convict, commits a breach of any rule, made under sub-section (5} of Section 356; or

(/} for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition,

[21][(²) Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.]

Arrest on refusal to give name and residence

42. (1} When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(z) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:

Provided that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India.

{3} Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

Clauses *(a), (d)* and *(g)* of Section 41(1) clearly show that the police have very wide powers of making arrests without warrant in respect of cognizable offences. However, these powers are not without limitations.[21] [22] The requirement of reasonability and credibility would hopefully prevent the misuse of such powers. What is a reasonable complaint or sus-

21, *Sub.* by Act 5 of 2009, S. 5*(it)* (w.e.f. i-ri-2010}.

22. *See,* discussions *in Joginder Kumar v. State of V.P.,* {1994} 4 SCC 260: 1994 SCC (Cri) 1172; *Nilabati Behera* v. *State of Orissa,* (1993) 2 SCC 746: 1993 SCC (Cri) 527; *State of M.P. v. Shyamsunder Trivedi,* {1995} 4 SCC *z6z:* 1995 SCC (Cri) 715; *D.K. Basu* v. *State of W.B.,* (1997) 6 SCC 642: 1997 Cri Lj 3525. Also see, *Poovan* v. *Sub-Inspector of Police,* 1993 Cri LJ 2183 (Ker);

circumstances in each case.[23] Personal feelings of the police officer or vague surmise would not be enough. The word "reasonable" brings in the requirement of honest belief based on facts. The words "reasonable" and "credible" have reference to the mind of the police officer receiving information, and such information must afford sufficient materials for the exercise of an independent judgment at the time of making arrest.[24] The police certainly have no power to arrest persons without warrant on the chance of something being thereafter proved against such persons. When the legality of an arrest without warrant is challenged in court, the burden is on the police officer to satisfy the court that he had reasonable grounds of suspicion.[25] It may be noted that malicious and excessive exercise of the powers of arrest under these sections would be punishable under Section 220 IPC.

The word "may" in Section 41(1} suggests that a police officer has discretion in making arrest without warrant. Question may arise as to whether a police officer is entitled to obtain a warrant of arrest from a Magistrate under the circumstances mentioned in Section 41. The Code makes no express provision in this connection. A Magistrate can issue a warrant of arrest only after taking cognizance of an offence.[26] However considering the import of Section 167 and Section 41 it might be inferred that a Magistrate might issue a warrant even before taking cognizance of an offence but in the circumstances in which a police officer can arrest without warrant under Section 41.[27] Further, a view has been expressed that even if a police officer has been empowered by Section 41 to arrest without warrant, this power is to be exercised in circumstances where the obtaining of a warrant from a Magistrate would involve unnecessary delay defeating the arrest itself.[28] This view, it appears, has not yet been universally adopted by the courts.

The circumstances under which a police officer can effect arrest without warrant have mrw been elaborately spelt out in the amended Section 41(1). The law certainly does not intend to give a licence to every policeman moving about on the road to search any person at his sweet will merely upon some suspicion of his own which may have no reasonable foundation at all. The police officer acting on suspicion of person in possession of implement for housebreaking should have at least definite information

23. *See,* observations in *Kajal Dey* v. *State of Assam,* 1989 Cri Lj
24. *Subodh Chandra Roy* v. *Emperor,* ILR (192.5) 52 Cal 319; *K.V. Mohammed* v. C.
25. *Emperor* v. *Vimlabai Deshpande.* (1946) 47 Cri Lj 831: AIR 1946
26. *See supra.* S. 204, para. 5.2.
27. *L. Ram Narain Singh* v. *A. Sen,* AIR 1958 All 758.
28. *Bir Bhadra Pratap Singh* v. *District Magistrate, Azamgarh,*

that he is in possession of an implement of housebreaking before putting that person under arrest,[29]

Clause (/) of Section 41(1} has been designed to facilitate the arrest of a person at a distance. A police officer may by sending a requisition to another police officer can get wanted person arrested by such other police officer. Such requisition can be made in writing or even through telephone or wireless. The clause, however, requires that the requisition must specify the person to be arrested and the offence or other cause for which the arrest is to be made. The police officer receiving such requisition can arrest such person without warrant only if it appears to him from the requisition that the person might lawfully be arrested without warrant by the officer sending the requisition.

It is pertinent to note that the exhaustive list of circumstances spelt out in Section 41(1) as amended makes it effective in preventing illegal arrests by police officers. The new proviso makes it obligatory for the police officer to adduce reasons if he decides not to arrest a person covered under this provision.

Though Section 41(2.) has been amended making no mention of persons covered under Sections 109 and no of the Code, it appears that this does not adversely affect the power of the police officer to effect arrest of such persons inasmuch as they are covered under the provisions of Section 41(1).

Section 41-A stipulates that the police officer shall in all cases where he decides not to make the arrest, issue notice to the persons complained against to appear before him to make necessary inquiries. If he does not cooperate the police officer may get him arrested after obtaining orders of the Magistrate.

Sections 41-B to 41-D lay down the procedure for making arrest:

Procedure of arrest and duties of officer making arrest

41-B. MEvery police officer while making an arrest shall—

[a] bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be—

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality wdiere the arrest is made;

{it} countersigned by the person arrested; and *{c)* inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.]

Control room at districts

[31][4i-C. fi) The State Government shall establish a police control room— (a) in every district; and (;b) at State level.

29. *Emperor* v. *Abdul Hamim,* AIR 1942 Ali 74, *76.*
30. *his.* by Act 5 of 2009, S. *6* (w.e.f. 1-11-2010).
31. *Ibid.*

(2.) The State Government shall cause to be displayed on the notice board kept outside the control rooms at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrests.

(3) The control room at the Police Headquarters at the State level shall collect from time to time, details about the persons arrested, nature of the offence with which they are charged and maintain a database for the information of the general public.]

41-D. [32] [33] [When any person is arrested and interrogated by the police, he shall he entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.]

Right of arrested person to meet an advocate of his choice during interrogation

The Supreme Court has had occasion to lay down the following guidelines for the police while arresting a judicial officer:

(a) A judicial officer should be arrested for any offence under intimation to District judge or the High Court.

(b) In case of necessity for immediate arrest only a technical or formal arrest may be effected.

(c) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the district concerned and the Chief Justice of the High Court.

(d) The judicial officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.

(e) Immediate facilities shall be provided to the judicial officer for communication with his family members, legal advisers and judicial officers, including the District and Sessions Judge.

(f) No statement of a judicial officer who is under arrest be recorded nor any *panchnama* be drawn up nor any medical tests be conducted except in the presence of the Legal Adviser of the judicial officer concerned or another judicial officer of equal or higher rank, if available.

(g) Ordinarily there should be no handcuffing of a judicial officer.

These guidelines are not exhaustive.[35] The Apex Court has added that if the arrest and handcuffing are found to be unjustified the police officer would be guilty of misconduct and personally liable for compensation or damages as may be summarily determined by the High Court.

The Supreme Court has also dealt with the issue of arrest of women between dusk and dawn. Modifying the Bombay High Court's order that no "female person to be arrested without the presence of a lady constable

32. *Ibid.*

33. *Delhi Judicial Service Assn.* V. *State of Gujarat,* (1991) 4 SCC 406: 1991 Cri Lj 3086. *See also,* the instructions issued by the Supreme Court in *D.K. Basu v. State of W.B.,* (1997) S CC 642: 1997 Cri LJ 3525 discussed *supra.*

and in no case in the night", the court held that all efforts should be made to keep a lady constable present but strict compliance can cause practical difficulties to investigating agencies and create room for evading the process of law by unscrupulous accused. Therefore, the court ruled that while arresting a female person, all efforts should be made to keep a lady constable, but in the circumstances where the arresting officers are reasonably satisfied that such presence of a lady constable is not available or possible and the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation, such officer for reasons to be recorded, be permitted to arrest a female person at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable.[34] This position has now been incorporated in Section 46(4) under which in exceptional circumstances the woman police is required to obtain prior permission of judicial Magistrate of first class within whose jurisdiction the offence is committed/arrest is made.[35]

Section 42 is clear in itself. If a person commits a non-cognizable offence in the presence of a police officer and refuses to give his name and address when demanded by such officer, he can be arrested by such officer in order to ascertain his name and residence. However, if his name and address w[r]ere previously known to the police officer, he cannot be arrested and detained under this section.[36]

5.9 Arrest by a private person without a warrant

It is in the general interest of the society that a person committing a very serious offence should be immediately arrested and expeditiously dealt with according to law. The powers of the police to arrest without warrant are to an extent helpful for his purpose but they may not in themselves prove adequate in all situations. When a serious offence has been committed in the presence of several private citizens and no police officer is anywhere near the scene of the offence, it would be totally unreasonable to tell the private citizens witnessing the crime that they cannot arrest the offender without first obtaining a warrant from a Magistrate or that they should do nothing except to inform the police and Magistrate and to wait for the police to take steps for arresting the culprit. The Code, therefore, empowers a private citizen to make arrest without warrant under certain situations. Section 43 provides:

34. *State of Maharashtra* v. *Christian Community Welfare Council of India,* {2003) S SCC 546:

35. *Ins.* by S. 6, Co de of Criminal Procedure

36. See, *Gopal hlaidu* v.

Arrest by private person and procedure on such arrest

43. (1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of Section 41, a police officer shall re-arrest him.

(3) If there is a reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence w[r]hich such officer has reason to believe to be false, he shall be dealt with under the provisions of Section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

The power of arrest without warrant given by this section can be exercised only in respect of an offence which is both non-bailable and cognizable. What is a cognizable offence has been already discussed earlier.[37] The expressions "bailable offence" and "non-bailable offence" have been defined in clause *(a)* of Section 2 which is as follows:

2. *(a)* "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence; ...

From this definition and from the provisions of First Schedule it would be clear that broadly speaking non-bailable offences are serious offences.

Definitions

While Section 42 allows a police officer to arrest without warrant a person committing or accused of committing a non-cognizable offence in his presence, this section allows a private citizen to arrest without warrant, only and only if a non-bailable and cognizable offence has been committed *in his presence*. The right of arrest under Section 43 accrues to a private citizen on the basis of his own personal knowledge derived from the use of his own eyes in seeing a non-bailable and cognizable offence being committed.[38] Where a private citizen seeing a person fleeing with a knife in hand being pursued by many persons shouting for his apprehension, attempts to arrest the fleeing person, the arrest is without any right contemplated by Section 43.[39] The right of arrest under this section must be exercised simultaneously with the commission of the offence.[40]

If the private citizen making arrest under this section fails to follow the after-arrest procedure as prescribed in the section, he can be prosecuted for the offence of wrongful confinement under Section 342 IPC.[41]

37. ***Supra,*** para. 4.3; ***see,*** S. ***z{c).***
38. ***Abdul Habib*** v. ***State,*** 1974 Cri Lj 248 (All); see also, ***Kartar Singh*** v. ***State,***
39. ***Ibid***; see also, ***Abdul Aziz*** v. ***Emperor,*** AIR 1933 Pat 508.
40. ***Kolavennu Venkayya, re,*** 1956 Cri LJ 970: AIR 1956 AP 156.
41. *See,* observations in *Supt. & Remembrancer of Legal Affairs* v. *Bagirath Mahto,* AIR

If an arrest under this section is made for an offence which is in fact not "cognizable and non-bailable" but because of a bona fide mistake believed to be so by the person making arrest, he would be protected by Section 751 IPC (Mistake as defence).[43] Sub-section (3} appears to have contemplated the cases of such type of mistakes on the part of private persons making arrests under the section.

Arrest by Magistrate

5.10 As the magistrates are relatively responsible executive and judicial officers with detached outlook, they have been given wider powers of arrest:

1} If *any* offence, irrespective of its nature and seriousness, is committed in the presence of any Executive or judicial Magistrate, such Magistrate can himself or with the help of others arrest the person committing the offence; 2) even if no such offence is committed in the presence of such Magistrate, but if the Magistrate is competent to issue a warrant for the arrest of any person, and the person is present before him, he can arrest such person. These powers have been given by Section 44 which is as follows:

Arrest by Magistrate

> 44. (1) When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.
>
> (2) Any Magistrate, whether Executive or judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

If a person arrested by a Magistrate under the above section is detained beyond 24 hours and is not produced before *another* Magistrate for obtaining an order of remand to custody under Section 167(1), his detention would be illegal.[43]

Considering the general principle embodied in Section 479 that a judge or Magistrate personally interested in a case should not try it, a Magistrate arresting a person under Section 44(1) should not try the case himself.

Partial exclusion of armed forces from the operation of above rules

When a member of the armed forces of the Union or State is deputed for the protection of public property in a State or for other such purposes, it may happen that one or more persons may do or attempt to do something in regard to which such member may be called upon to take action

5.11

Cal 6to, 614-15.

42. ***See,*** observations in ***Anant Prasad Ray*** v. ***Emperor,*** (1926) 27 Cri Lj 1578, rj80-81 (Pat).
43. *Stvami Haribaranand Saraswati* v. *Jailor 1/C Distt. Jail, Bernards,* AIR 1954 All 601, 604—05.

in good faith. Such action may expose him to the possibility of being arrested and prosecuted by the police. To meet such or similar situations, a qualified protection has been given to such a member by Section 45 requiring the previous consent of the Central Government or the State Government, as the case may be, for the arrest of any such member.[44] Section 45 is as follows:

45. (1) Notwithstanding anything contained in Sections 41 to 44 (both inclu- *Protection of members of the Armed Forces* sive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

{2) The State Government may, by notification, direct that the provisions of sub-section (1) shall apply to such class or category of the members of the Force charged with the maintenance of public order or as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

It may be noted here that sub-sections (2) and (3) of Section 197 prohibit taking cognizance of any offence alleged to have been committed by any member of the armed forces while acting or purporting to act in the discharge of his official duty except with the previous consent of the Central Government or the State Government as the case may be.

Proclamation for person absconding

5.12

in cases where a summons for the appearance of the accused person is to be issued, but if the court has reason to believe that the accused has absconded or will not obey the summons, or in case where the accused person on whom the summons is duly served for appearance fails to appear without offering any excuse for non-appearance, a warrant of arrest can be issued.[45] Now in cases where a warrant of arrest has been issued against an accused person and there are reasons to believe that the accused person has absconded or is concealing himself to avoid the execution of the warrant, the court may publish a written proclamation requiring such person to appear before it and may attach his property. If the accused person fails to appear before the court as required by the proclamation the property- attached would be at the disposal of State Government and could be sold.

This stringent provision would exert considerable pressure on the accused and would impel him to appear before the court in order to avoid deprivation of his property. These matters have been provided in detail by Sections 82 to 86. Section 82 which provides for the publication of the proclamation for the absconding accused person, is as given below:

44. *See,* Notes on els. 485 and

45. *See supra,* S. 87, para. 5.a.

Proclamation for ***person absconding***

82. (i) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:—

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

{c) a copy thereof shall be affixed to some conspicuous part of the Court house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

The terms of the above section are mandatory and imperative, and a proclamation cannot be issued without first issuing a warrant of arrest.[46] Therefore if there is no authority to issue a warrant of arrest, the issuing of proclamation would be obviously illegal. Before issuing a proclamation the court is to satisfy itself by examining the serving officer or in any other manner that a warrant of arrest had already been issued and that the accused is absconding, concealing, or evading the execution of the warrant.[47] Also, he should consider exercising his powers for dismissal under Section 203 before he invokes his powers under Section 82.[48] The word "abscond" does not necessarily mean leaving a place. Its ordinary and etymological sense is to "hide oneself'. When in order to evade the process of law a person is hiding from (or even in) his place of residence, he is said to "abscond".[49] [50] A person cannot said to abscond to evade the execution of warrant when he had gone to a distant place before the issue of the warrant.[30] The section must be strictly construed as the failure to obey the orders in this section has penal consequences. The requirement

46. ***Bishundayal*** v. ***Emperor,*** AIR 1943 Pat 366. Also see, ***Devendra Singh Negi*** v. ***State of U.P.,*** 1994 Cri IJ 1783 (All).

47. ***Ibid.***

48. ***See,*** discussions in ***Kailash Chaudhari v. State of U.P.,*** 1994 Cri

49. ***Kartarey*** v. ***State ofU.P.,*** (1976) ***1 SCC*** 172: 1975 SCC (Cri) 803, Sro: 1976 Cri 4J 13; see also, K.T.M.S. ***Abdul Cader*** v. ***Union of***

50. N.M.V. ***Vellayappa Chettiar*** v. ***Alagappa Cbettiar,*** AIR 1942 Mad 289; see also, ***M.S.R. Gundappa*** v. ***State of Karnataka,*** 1977

as to time and place is mandatory,[51] [52] [53] and if the period fixed is less than 30 days the subsequent proceedings will be invalid.[52] [53]

As part of the efforts to arm the courts to help investigations without the possibility of human rights violations, the Code of Criminal Procedure (Amendment) Act, 2.005 [now] empowers the court to declare a person proclaimed offender if he is accused of some serious offences and fails to appear in response to its proclamation under sub-section (4) of Section 82,. A new Section 174-A making the non-appearance an offence has also been incorporated in the IPC.[51]

Attachment of property of person absconding

5.13

The property of the person against whom a proclamation is issued under Section 82 can be attached (and later disposed of) in order to compel his appearance in court. This has been provided by Section 83 as follows:

Attachment of property of person absconding

83. (1) The Court issuing a proclamation under Section 82 may, for reasons to
be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable or both, belonging to the proclaimed person:

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court,

it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to
such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) by seizure; or

{b) by the appointment of a receiver; or

(e) by an order in writing prohibiting the delivery of such property to the proclaimed person or to anyone on his behalf; or

51. *Pal Singh Santa Singh* v. *State,* AIR 1955 Punj 18; *Birad Dan* v. Sta

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Government, be made through the Collector of the district in which the land is situate, and in all other cases—

{a) by taking possession; or

(,b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit,

(5} if the property ordered to be attached consists of livestock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).

The court issuing the proclamation can attach the property at any time and it is not necessary to wait till the expiry of the time prescribed in the proclamation for appearance. It has been ruled by the Allahabad High Court that unless 30 days have elapsed after the proclamation was issued under Section 82 no attachment could be ordered under Section 83.[54] The court, however, is required to record reasons while issuing the order of attachment. If the conditions mentioned in the proviso to sub-section (i) are present, the order of attachment can be passed simultaneously with the order made for the publication of the proclamation.

If any person other than the proclaimed person is in any manner aggrieved by the order of attachment, Section 84 provides:

Claims and objections to attachment

84. {1) If any claim is preferred to, or objection made to the attachment of, any property attached under Section 83, within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under Section 83, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.

{2} Claims or objections under sub-section (1} may be preferred or made in the Court by which the order of attachment is issued, or, if the claim or objection is in respect of property attached under an order endorsed under sub-section (2} of Section 83, in the Court of the Chief judicial Magistrate of the district in which the attachment is made.

(3} Every such claim or objection shall be inquired into by the Court in which it is preferred or made:

Provided that, if it is preferred or made in the Court of a Chief Judicial Magistrate, he may make it over for disposal to any Magistrate subordinate to

54. *Devendra Singh Negi* v. *State ofU.P* 1994 Cri LJ 1783 (All}.

(4) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (1} may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive.

Release, sale and restoration of attached property

5.14

This has been provided by Sections 85 to 86 which are as given below:

Release, sale and restoration of attached property

85. (1) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.

(2) If the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under Section 84 has been disposed of under that section, unless it is subject to speedy and natural decay, or the Court considers that the
sale would be for the benefit of the owner; in either of which cases the Court may cause it to be sold whenever it thinks fit.

(3} If, within two years from the date of the attachment, any person whose property is or has been at the disposal of the State Government, under subsection (2), appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying therefrom ail costs incurred in consequence of the attachment, be delivered to him.

86. Any person referred to in sub-section (3) of Section 85, who is aggrieved by any refusal to deliver property or the proceeds of the sale thereof may appeal to the Court to which appeals ordinarily lie from the sentences of the first- mentioned Court. t

Appeal from order rejecting application for restoration of

It will be seen that Section 85(3} provides a remedy where there has been a good and legal publication of proclamation under Section 82; however it does not provide for the contesting of the legality of the proclamation itself. Probably the High Court in the exercise of its inherent powers under Section 482 may grant
relief or the aggrieved part^r can seek his re^eedy by a suit in ciiril court

5.15 Additional powers for ensuring appearance of accused in court

When a person, for whose appearance in court a summons or a warrant can be issued, is in fact present in court, the court instead of proceeding with the issuing of a summons or warrant in his case, may require him to execute a bond for his appearance in court. This has been provided by Section 88 which is as follows:

Power to take bond for appearance

> 88. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.

It may be noted that when after investigation a case is to be sent to a Magistrate under Section 170, the investigating police officer is enjoined to require the complainant and witnesses to execute a bond to appear before the concerned Magistrate and prosecute or give evidence (as the case may be) in the matter of the charge and in case of refusal to execute such a bond the police officer may forward such person in custody to the Magistrate who may detain him in custody until the bond is executed or the hearing of the case is completed *(see* proviso to S. 171). In the light of this provision it would appear anomalous if it was held that in a more or less analogous situation a presiding officer of the court has no power to commit the person to custody on his refusal to execute a bond for his appearance in such court. Therefore, though the Allahabad High Court[55] has disapproved its earlier decision[56] and held that the Magistrate has no power to commit a person to custody in the event of his refusing to execute a bond as contemplated by Section 88, that decision does not appear to be quite sound.

If the person after executing a bond for his appearance in court fails to appear, Section 89 provides that the court can issue a warrant for his arrest. Section 89 is as follows:

Arrest on breach of bond for appearance

> 89. When any person who is bound by any bond taken under this Code to appear before a Court, does not appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

TABLE 6: Procuring the appearance of accused in court

s issuin 9 summons	f if accused happens to be in court, by requiring him to bond for appearance [S. 88]	1 By arresting the accused

Summons are issued—

(/) Ordinarily in ai! summons cases; [S. 204 read with S. 2(w)]
(//) Also in warrant cases at court's discretion; [S. 204 read with S. 2(x)j

Note—Personal attendance of accused in court may be dispensed with at court's discretion. [5. 205]

With warrant	Without warrant
Warrant is issued—	(/} By police officer; [S. 41, S. 42]
(/} Ordinarily in ail warrant cases; [S. 204 read withS.2{x)]	(//) By police officer in charge of police station; [S. 41(2]]
(//] Even in summons cases, if necessary; [5.[8]7]	(///) By a Magistrate; [S. 44]
(Hi) in case of breach of bond for appearance	*{iv}* By private person; [S. 43]
	Exception created in case of members of

_] T7 _____ rr> . _ 1

Chapter 6

Pre-trial Procedure: Arrest, and the Rights of the Arrested Person

Significance of the chapter 6.1

As mentioned in the earlier chapter, arrest can be made either under a warrant or without a warrant under certain circumstances.[1] The discussion in Chapter 5 dealt with the conditions under which a person can arrest another; however that did not deal with—*a)* how the arrests are made, *b)* what powers have been given to persons making arrests to facilitate their work, *c)* what restraints are put on the exercise of these powers for safeguarding public interest, *d)* what rights are given to the arrested person for facilitating his defence, and *e)* what are the legal consequences of the non-compliance of the rules relating to the abovesaid matters. These matters have been dealt with in this chapter.

Arrest means the deprivation of a person of his liberty by legal authority or at least by apparent legal authority. For instance, when a police officer apprehends a pick-pocket he is *arresting* the pick-pocket; but when a dacoit apprehends a person with a view to extract ransom, the dacoit is not arresting that person but wrongfully confining that person. *Secondly,* every compulsion or physical restraint is not arrest but when the restraint is total and deprivation of liberty is complete, that would amount to arrest.

If a person suppresses or overpowers the voluntary action of another and detains him in a particular place or compels him to go in a specific direction, he is said to imprison that other person. If such detention or imprisonment is in pursuance of any legal authority or apparent legal authority,

1. *See supra** Chap. 5, paras. 5.2, 5.4, 5.8-5.10.

it would amount to arrest. Preventing a person from making his movements and from moving according to his will amount to arrest of such person.[2]

In a free society like ours, law is quite jealous of the personal liberty of every individual and does not tolerate the detention of any person without legal sanction. The right of personal liberty is a basic human right recognised by the General Assembly of the United Nations in its Universal Declaration of Human Rights. This has also been prominently included in the convention on Civil and Political Rights to which India is now a party. Our Constitution recognises it as a fundamental right. Article *zi* provides:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

Further, the procedure contemplated by this article must be "right, just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.[3]

Thus the personal liberty being the cornerstone of our social structure, the legal provisions relating to arrests have special significance and importance.

6*2 Arrest how made

The circumstances in which police officers magistrates and private citizens are authorised to make arrest without warrant have been mentioned in Sections 41 to 44.[4] [5] The manner in which the arrest can be effected by any such person is provided by Section 46 which is as follows:

> 46. fi) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action:
>
> [5][Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.}
>
> *(z)* If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use ail means necessary to effect the arrest.
>
> (3} Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life. [2] [3] [4] [5]

Arrest how made

2. *Kaiser Otmar v. State ofT.N.,* 1981 LW (Cri) 158 (Mad).
3. *hianeka Gandhi* v. *Union of India,* {1978} 1 SCO 248, 2,84: AIR 1978 SC 597.
4. *See supra,* paras. 5.S, 5.9, 5.10.
5. *Ins.* by Act 5 of 2,009, $-1 (w.e.f. 3r-r2.-2.009).

[6][(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of first class within whose local jurisdiction the offence is committed or the arrest is to be made.]

Arrest being a restraint of the liberty of a person it can be effected by actually contacting or touching the body of such person or by his submission to the custody of the person making the arrest. An oral declaration of arrest without actual contact or submission to custody will not amount to an arrest/ The submission to custody may be by express words or may be indicated by conduct.[6 7 8] If a person makes a statement to a police officer, accusing himself of having committed an offence, he would be considered to have submitted to the custody of the police officer.[9] If the accused proceeds towards the Police Station as directed by a police officer, he would be held to have submitted to the custody of the police officer.[10]

In case there is forcible resistance to or attempt to evade arrest, the person attempting to make arrest may use all necessary means for the same. Whether the means used for arrest were necessary or not would depend upon whether a reasonable person having no intention to cause any serious injury to the other would have used to effect his arrest. Further, resistance or obstruction to *lawful* arrest has been made punishable by the Penal Code, i860 (IPC).[U]

On the other hand sub-section (3) of Section 46 enjoins in clear terms that though persons making arrests can use all necessary means for the purpose, they have not been given any right to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life.[12 13] Again Section 49 provides that "the person arrested shall not be subjected to more restraint than is necessary to prevent his escape".[15]

The case law produced by the courts in response to the demand for protecting women has made Parliament to enact sub-section (4} to Section 46 laying down that no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police [6 7 8 9 10 11 12 13]

6. *Ins.* by Act 25 of 2005, S. 6 (w.e.f. 23-6-2006).
7. *Harmoha?ilal* v. *Emperor,* {1929) 30 Cri LJ 128; *Aludomal* v. *Emperor,* (1916) 17 Cri Lj 87 (SindJCC).
8. *Paramhansa* v. *State,* AIR 1964 Ori 144; *State ofU.P.* v. *Deoman Upadbyaya,* 1960 Cri LJ 1504: AIR 1960 SC 1125, 1131.
9. *Bharosa* v. *Emperor,* (1941) 42 Cri Lj 390: AIR 1941 Nag 86. 90; *Legal Remembrancer* v. *Lalit Mohan Singh Roy,* ILR (1921) 49 Cal 167; *Santokhi Beldar* v. *Emperor,* (1933) 34 Cri LJ 349; 35[1]
10. *Supt. & Remembrancer of Legal Affairs v. Kaloo Khan,* {1948) 49 Cri LJ 22: AIR 1948 Cai 68. See, observations in *Roshan Beevi* v. *State ofT.N.,* 1984 Cri LJ 134 (FB) (Mad).
11. *See,* Ss. 224, 225, 225-B IPC.
12. See also, *Karam Singh* v. *Hardayal Singh,* 1979 Cri LJ 1211, 1215 (PScH).
13. See, *Aeltemesh Rein* v. *Union of India,* 1988 SCO (Cri) 900: (1988) 4 SCC 54 and the cases referred to therein. Also read, *Citizens for Democracy* v. *State of Assam,* (1993) 3 SCC 743: 1995 SCC (Cri) 600; G.L. *Gupta* v. *R.K. Sharma,* 1999 SCC Cri 1150:

officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of first class within whose jurisdiction the offence is committed or arrest is to be made.[14]

63 Additional powers for effecting arrest

(a) Search of place.—According to Section 47 an occupier of a house is under a legal duty to afford to the police all the facilities to search the house for the purpose of making arrests. If such facilities are denied or obstructions are put in the way of the police officer, the section allows the officer to use force for getting entry into the house for search and also for the purpose of liberating himself in case he is detained in the house. The section also puts reasonable restrictions on the police when the part of the house to be searched is occupied by a *pardanashin* woman. Section 47 is as follows:

Search of place entered by person sought to be arrested

47. (1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2} If ingress to such place cannot be obtained under sub-section (1), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance:

Provided that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

(3) Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

1 4 . *I n s*

(b) Pursuit of offenders.—Section 48 provides that "a police officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest, pursue such person into any place in India". A police officer's power to arrest is ordinarily limited to the police district.[15] This power has been, to an extent, supplemented by Section 48 of the Code.

In case the arrest is to be made under a warrant, Section 77 makes it clear that "a warrant of arrest may be executed at any place in India". However, when a warrant of arrest is to be executed outside of the local jurisdiction of the court issuing it, a special procedure, as prescribed by Sections 78 to 81, will have to be followed. This has already been discussed in Chapter 5.[16]

{c) *Deputing subordinate to arrest.*—If a senior police officer in his presence requires a subordinate police officer (or even any other person) to arrest a person who may be lawfully arrested without a warrant, such subordinate officer is under a duty to arrest.[17] If however the senior police officer wants to send and depute a subordinate for arresting a person without a warrant, he can give an order in writing to the subordinate specifying the person to be arrested and the cause for which the arrest is to be made. This has been provided by Section 55 which is as follows:

> 55. (1) When any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.
>
> (z) Nothing in sub-section (1) shall affect the power of a police officer to arrest a person under Section 41.

Procedure when police officer deputes subordinate to arrest without warrant

[d) Power, on escape, to pursue and retake.—If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India. [S. 60(1)] The person making such re-arrest has the same powers and duties as mentioned in Sections 46 and 49.[18] Therefore, if a police officer is attempting to re-arrest an escaped thief, he has no right to shoot the thief.[19] Provisions regarding search of place, discussed in *(a)* above, shall apply in respect of re-arrest also, although "the person making any

15. *See,* S. 22. Police Act, 1861
16. *See supra,* para. 5.6.
17. *See supra,* S. 37, para. 4.8.
18. *See supra,* para. 6.2.
19. *Dakbi Singh* v. *State,* 1955 Cri LJ 905: AIR

such arrest is not acting under a warrant and is not a police officer having authority to arrest". [S. 60(2)]

6.4 Post-arrest procedures

(a) *Search of arrested person*.—Section 51 empowers a police officer to make a search of the arrested person under certain circumstances. Such search may prove useful for proper investigation. If incriminating things or stolen articles are found in such search, the police officer can seize them under Section 102 and produce them in court. Section 51 is as follows:

Search of arrested person

51. (1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail, and

the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

(2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

Though the section does not require the search to be conducted in the presence of witnesses, the rules made under the Police Act, direct that the search should be made in the presence of witnesses. The witnesses should be independent and respectable. It will be seen that the power to search under Section 51 is available only if the arrested person is not released on bail. After search all the articles other than necessary wearing apparel found upon the arrested person are to be seized, and it has been made obligatory to give to the arrested person a receipt showing the articles taken in possession by the police. This would ensure that the articles seized are properly accounted for. In case the arrested person is a woman the search can be made only by a female with strict regard to decency. But simply because there was some irregularity in making such search that in itself will not make the search-evidence inadmissible.[20] For instance, the failure of the police to take out a recovery memo—an irregularity was held not vitiating the trial.[21]

ib) Seizure of offensive weapons.—**Section 52 provides:**

Power to seize offensive weapons

52. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person,

and shall deliver ail weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

It may be noted that the seizure can be made by *any* person making arrest under this Code.

(c) Medical examination of accused after arrest.—"To facilitate effective investigation, provision has been made authorising an examination of the arrested person by a medical practitioner, if, from the nature of the alleged offence or the circumstances under which it was alleged to have been committed, there is reasonable ground for believing that an examination of the person will afford evidence."[22] [23] Section 53 empowers senior police officers to compel the accused person in custody to submit to medical examination. Section 53 reads:

Examination of accused by medical practitioner at the request of police officer

53* (r) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

[23][*Explanation*.—In this section and in Sections 53-A and 54,—

{a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) ' "registered medical practitioner" means a medical practitioner who possesses any medical qualification as defined in clause (/?) of Section *Z* of the Indian Medical Council Act, 1956 {102 of 1956) and whose name has been entered in a State Medical Register.]

Question might arise as to whether this provision is violative of the constitutional privilege against self-incrimination. The Law Commission after considering the decision of the Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad*[22] [23] [24] *{Kathi Kalu),* has expressed the view that the decision has

22. See, Notes on els. 44-61.

23. *Subs,* by Act 25 of 2005, S. 8

24. (1961) 2 Cri Lj 856: AIR 1961 SC 1808.

the effect of confining the privilege under Article 2.0(3^° ^Bly testimony written or oral.[25]

Relying on the principles laid down by the Supreme Court in the *Kathi Kalu case* it has been held that Section 53 is not violative of Article 2,0(3) and that a person cannot be said to have been compelled "to be a witness" against himself if he is merely required to undergo a medical examination in accordance with the provisions of Section 53.[26]

The power to compel the accused to submit to medical examination is hedged in various conditions. The object obviously is to balance the conflicting interests of the individuals and the society.

The medical examination contemplated by the section may take various forms. The expression "examination of the person" as used in Section 53 cannot be restrictively confined only to the examination of the skin or what is visible on the body itself. The examination of some organs inside the body for the purpose of collecting evidence may become necessary and such an examination cannot be held to be beyond the purview of this section. Examination by a medical practitioner logically take in examination by testing his blood, sputum, semen, urine, etc. It may include X-ray examination or taking electrocardiograph depending upon the nature of the case.[27 *]

The section itself permits the use of force as is reasonably necessary for the purpose of medical examination of the arrested person. Sometimes such a medical examination may cause pain and hurt to the examinee. It may be that some discomfort is caused to the person the samples of whose blood or semen are taken for medical examination under this section; and if the process of taking such samples is reasonable under the circumstances, then the causing of consequential discomfort to the person is justified by the section.

Though the section lays down a condition that the medical examination is to be done at the instance of a police officer not below the rank of sub-inspector, it does not debar other superior officers or the court concerned from exercising the said power if it becomes necessary for doing justice in a criminal case. It is, therefore, open to the court which is seised of the matter to issue direction or to grant approval or permission to the police for carrying out further investigation under Section 53.[29]

25. 37th Report, p. 2.05.
26. *Anil A. Lokhande* v. *State of Maharashtra,* 1981 CriLJ 125,130 (Bom);
27. *Ibid.* Also read, *Neeraf Sharma* v. *State of V.P.,* 1995 Cri LJ zz66 (All) wherein the High Court ruled that the police powers for taking samples of blood etc. could be exercised by the Magistrate. In this case the Magistrate's ordering of taking sample of hair of accused for examination was held not violative of Art. 20(3) of the
28. Ibid.
29. *Anil A. Lokhande* v. *State of Maharashtra,* 1981 Cri LJ 125, 130 (Bom). The

The medical examination contemplated by the section is in respect of a "person arrested on a charge of committing of an offence". Even if an accused person is released on bail, he is still "a person arrested on a charge of committing an offence". Moreover, such a person while released on bail is notionally in the custody of the court (through the surety) and therefore his medical examination can be carried out in terms of Section 53.[50]

It may be useful to mention here some of the provisions of the Identification of the Prisoners Act, 1920, which, like the medical examination of the accused under this section, are helpful for police-investigations. Section 4 of the Act empowers a police officer to take measurements (including finger impressions and footprint impressions) of a person arrested in connection with an offence punishable with imprisonment which may extend to one year or more. Section 5 of the Act further provides that if in the opinion of a Magistrate it is expedient to direct any person to allow his measurements or photographs to be taken for the purpose of investigation or proceeding under the Criminal Procedure Code, 1973, he may make an order to that effect, provided that the person at some time or other has been arrested in connection with such investigation or proceeding.

By giving an elaborate explanation as to the meaning of "examination" and "registered medical practitioner" the Code of Criminal Procedure (Amendment) Act, 2005 has inserted Sections 53-A, 54(2} and 54-A laying down the procedure for the conduct of medical examination. Section 54 has since been substituted as follows:

Examination of arrested person by medical officer

54. [30] [31][(i) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (i), a copy of the report of such examination shall be furnished by the medical officer or

contrary expressed by Bombay High Court in its earlier decision in *State of Maharashtra* v, *Dnyanoha Bhikoba Dagade,* 1979 Cri LJ 277 (Bom) do not represent any longer the

30. *Anil Ac. Lokhande* v. *State of Maharashtra,* 1981 Cri LJ 125, 130 (Bom); see also, *Ananth Kumar Naik* v. *State of A.P.,* 1977 Cri Lj 1797 (AP); *Thaniel Victor* v. *State* o/T.N., 1991 Cri Lj 2416

31. *Subs, by* Act 5 of 2009, S. 8 (w.e.f. 31-12-2009).

registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.]

This newly inserted Section 53-A[32] empowers investigating agency to compel medical practitioners to help it to get the person accused of rape examined promptly. The sub-section (2} spells out the particulars to be furnished in the report thus:

(i) the name and address of the accused and of the person by whom he was brought;

(ii) the age of the accused;

(Hi) marks of injury, if any, or the person of the accused;

(:iv) the description of material taken from the person of the accused for DNA profiling; and

(v) other material particulars in reasonable detail;

(vi) the reasons for each conclusion arrived at by the practitioner;

(vii) the exact time of commencement and completion of the examination.

The medical practitioner should send up the report to the Magistrate through the Investigating Officer. A copy of the report should also be sent to the accused.[53]

(d) Report of arrests to be sent to District Magistrate.—Section 58 provides:

Police to report apprehensions

58. Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

The object of the report is to keep the District Magistrate etc. informed of the situation regarding grave offences.[34] The administration of police

32. S. 53-Af 1) enacts:

53"A. *Examination of person accused of rape by medical practitioner.*—(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

33. S. 54(2.} enacts:

54, *Examination of arrested person by medical officer.*—(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the registered medical practitioner to the arrested person or the person nominated by such arrested person.

Both Ss. 53-A and 54(2} have been brought into force with effect from 23-6-2006.

34. 37th Report, para. 206.

in a district is under the general control and direction of the District Magistrate.[35] Therefore the report under this section would enable him to see whether the police are exercising their powers properly or not.

(e) Person arrested not to be discharged except on bond or bail.—

Section 59 provides:

59. No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate, *Discharge of person apprehended*

Once a person is arrested by police, he can be enlarged only after taking a bond or bail for his appearance before a Magistrate; the police cannot discharge him on their own responsibility without the order of a Magistrate.

The special order of a Magistrate contemplated in this section is a special order of a Magistrate under Section 167 which prescribes procedure when investigation according to police cannot be completed within 24 hours.

Rights of arrested person 6.5

In the preceding paragraphs it has been pointed out that though the police have been given various powers for facilitating the making of arrests, the powers are subject to certain restraints. These restraints are primarily provided for the protection of the interests of the person to be arrested, and also of the society at large. The imposition of the restraints can be considered, to an extent, as the recognition of the rights of the arrested person. There are, however, some other provisions which have rather more expressly and directly created important rights in favour of the arrested person. These would be discussed here.

(a) Right to know the grounds of arrest.—**According to Section 50(1):**

50. (1) Every police officer or other person arresting any person without war- ***Person arrested to be informed of grounds of arrest and of right to bail*** rant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

Secondly, when a subordinate officer is deputed by a senior police officer to arrest a person under Section 55,[36] such subordinate officer shall, before making the arrest, notify to the person to be arrested the substance of the written order given by the senior police officer specifying the offence or other cause for which the arrest is to be made. Non-compliance with this provision will render the arrest illegal.[37]

Thirdly, in case of arrest to be made under a warrant, Section 75 provides that "the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so

35. *See,* S. 4, Police Act, 1861.
36. *See supra,* para. *6.3.*
37. *Ajit Kumar v. State of Assam,* 197 *6 Cri* LJ 1303 (Gau).

required, shall show him the warrant". If the substance of the warrant is not notified, the arrest would be unlawful.[38]

Apart from these provisions of the Code recognising the right to know the grounds of arrest, our Constitution has also conferred on this right the status of a fundamental right. Article 2,2.(1} of the Constitution provides: "No person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice."

The right to be informed of the grounds of arrest is a precious right of the arrested person.[39] Timely information of the grounds of arrest serves him in many ways. It enables him to move the proper court for bail, or in appropriate circumstances for a writ of habeas corpus, or to make expeditious arrangements for his defence. As observed by the Supreme Court:

> Article 22(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the rule of law prevails. The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also, to know exactly what the accusation against him is, so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him.[40]

It appears reasonable to expect that the grounds of arrest should be communicated to the arrested person in the language understood by him; otherwise it would not amount to sufficient compliance with the constitutional requirement.[41] The words "as soon as may be" in Article 22(1) would mean as early as is reasonable in the circumstances of the case,[42] however, the word "forthwith" in Section 50(1) of the Code creates a stricter duty on the part of the police officer making the arrest and would mean "immediately".

The right to be informed of the grounds of arrest is recognised by Sections 50, 55 and 75 in cases where the arrest is made in execution of a warrant of arrest or where the arrest is made by a police officer without warrant. If the arrest is made by a Magistrate without a warrant under Section 44,[43] the case is covered neither by any of the Sections 50, 55 and 75 nor by any other provision in the Code requiring the Magistrate to

38. *Satisb Chandra Rai v.Jodu Nnndan Singh,* ILR (1899} *z6* Cai 74$; *Abdul Gafur* v. *Queen Empress,* ILR (1895-96) 13 Cal 896.
39. ***XJdaybhan Sbuki*** v. ***State of U.P.,*** 1999 Cri IJ 2,74 (All).
40. ***Madhu Lhnaye, re,*** (1969) 1 SCC 292.: 1969 Cri LJ 1440. See also, ***Christie*** v. ***Leachinsky,*** 1947 AC 573: {1947) 1 All HR 567 (HL).
41. ***Harikisan*** v. ***State of Maharashtra,*** (1:962} r Cri LJ 797: AIR 1962 SC 911, 914, [The case was under Art. 22(5}].
42. ***Tarapada De*** v. ***State of W.B.,*** (1951) 52 Cri LJ 400: AIR 1951 SC 174. [The case was under Art. 22(5}.]
43. ***See supra,*** para. 5.10.

communicate the grounds of arrest to the arrested person. This lacuna in the Code, however, will not create any difficulty in practice as the Magistrate would still be bound to state the grounds under Article 22(1) of the Constitution.

The rules emerging from decisions such as *Joginder Kumar* v. *State of U.P.*[44] and *D.K. Basu* v. *State of W.B.*[45], referred to *infra*[46] have been enacted in Section 50-A[47] making it obligatory on the part of the police officer not only to inform the friend or relative of the arrested person about his arrest etc. but also to make an entry in a register maintained by the police. The Magistrate is also under an obligation to satisfy himself about the compliance of the police in this regard.

(b) Information regarding the right to be released on bail.— **Section 50(2) provides:**

> 50. {2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

This will certainly be of help to persons who may not know about their rights to be released on bail in case of bailable offences. As a consequence this provision may in some small measure, improve the relations of the people with the police and reduce discontent against them.

(c) Right to be taken before a Magistrate without delay.—Whether the arrest is made without warrant by a police officer, or whether the arrest is made under a warrant by any person, the person making the arrest must bring the arrested person before a judicial officer without unnecessary delay. It is also provided that the arrested person should not be confined in any place other than a police station before he is taken to the Magistrate. These matters have been provided by Sections 56 and 76 which are as given below:

44. (1994} 4 SCC 2.60: 1994 SCC (Cri) 1172.
45. (1997} 1 SCC 416: 1997 SCC (Cri) 92.,
46. *Infra,* p. 88.
47. *Ins.* by Act 25 of 2005 effective from 23-6-2006. S. 50-A enacts thus:

> 50-A. *Obligation of person making arrest to inform about the arrest, etc., to a nominated person.*—(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.
>
> (2) The police officer shall inform the arrested person of his rights under subsection (1} as soon as he is brought to the police station.
>
> (3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.
>
> (4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person.

Person arrested to be taken before Magistrate or officer in charge of police station

Person arrested to be brought before Court

56. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

76. The police officer or other person executing a warrant of arrest shall (subject to the provisions of Section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person:

Provided that such delay shall not, in any case, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

(d) Right of not being detained for more than 24 hours without judicial scrutiny.—Here again, whether the arrest is without warrant or under a warrant, the arrested person must be brought before the Magistrate or court within 24 hours. Section 57 provides:

Person arrested not to be detained more than twenty-four

57. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

It may also be noted that the right has been further strengthened by its incorporation in the Constitution as a fundamental right. Article *12(2}* of the Constitution provides:

22. Protection against arrest and detention in certain cases.—(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate with a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

In case of arrest under a warrant the proviso to Section 76 provides a similar rule In substance.[48]

The right to be brought before a Magistrate within a period of not more than 24 hours of arrest has been created with a view: *i)* to prevent arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information; *ii)* to prevent police stations being used as though they were prisons—a purpose for which they are unsuitable; *Hi)* to afford an early recourse to a judicial officer Independent of the police on all questions of bail or discharge.[49] The precautions laid down in Section 57 seem to be designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and [4]

4S. *See supra,* sub-part *(c),* para. 6.5.
49. *Mohd. Suleman* v. *King Emperor,* (1425-26] 30 CWN 985, 987 (FR) *{per* Rankin i)

some knowledge of the nature of the charge against the accused, however, incomplete the information may be.[50]

The Supreme Court has strongly urged upon the State and its police authorities to ensure that this constitutional and legal requirement to produce an arrested person before a Judicial Magistrate within 24 hours of the arrest be scrupulously observed. This healthy provision enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try to enforce this requirement and where it is found disobeyed, come heavily upon the police.[51]

If a police officer fails to produce an arrested person before a Magistrate within 24 hours of the arrest, he shall be held guilty of wrongful detention.[52] Frequent complaints about the police's non-compliance of this requirement has made the Kerala High Court to instruct the Magistrates to call upon the police officer, on receipt of a complaint, to state in the form of an affidavit whether the allegations are true. If the officer denies the arrest the Magistrate may make an inquiry into the issue and pass appropriate orders. The Magistrate can also exercise his powers for making searches under Section 97 to issue a search warrant and in case of non-compliance to proceed against the officer for contempt and initiate proceedings under Section 342 IPC.[53]

The tendency of certain officers to note the time of arrest in such a manner that the accused's production before the Magistrate w*as well within 24 hours of the arrest has been disapproved.[54]

In Section 57, the words "special order of a Magistrate under Section 167" refer to the power of the Magistrate to order detention in police custody for a limited period in order to facilitate police investigations. The Magistrate before passing any such order under Section 167 has to satisfy himself as to the necessity of remanding the accused to police custody. These matters would be discussed later.

Article 22(2), on the face of it, appears to apply to cases of arrests without warrant as well as of arrests under a warrant. However in *State of Punjab* v. *Ajaib Singh*[55]* the Supreme Court has observed that the said article relates to arrests without warrant only. The court felt that in case of an arrest on a warrant the judicial mind had already been applied to the need for arrest and that there was no need to provide any safeguard in absolute terms. This view has been criticised to be unreasonable and wrong. Be that as it may, the proviso to Section 76 unmistakably extends

50. *Du/arkadas Har'tdas* v. *Amba Lai Ganpatram,* (1924) 2,5 Cri Lj 1203: (1923-24) 28 OWN 85°.
853. *Also see* observations in *Manoj* v. *State of M.P.,* (1999) 3 SCO 715: 1999 SCC (Cri) 478: 1999 Cri Lj 2°95 and *Hari Om Prasad* v. *State of Bihar,* 1999 Cri Lj 44°° (Pat).
51. *Khatri (2}* v. *State of Bihar,* {1981} 1 SCC 627, 632: 1981 SCC (Cri) 228: 1981 Cri Lj 47°; *DG & IG of Police* v. *Prem Sagar,* {1999) 5 SCC 7°°: 1999 SCC (Cri) 1°36.
52. *Sharifbai* v. *Abdul Kazak,* AIR 1961 Bom 42.
53. *Poouan* v. *Sub-Inspector of Police,* 1993 Cri Lj 2183 (Ker).
54. *Ashok Hussain Allah Dehta* v. *Collector of Customs,* 199° Cri Lj 22°1 (Bom).
55. 1953 Cri Lj 18°: AIR 1933 SC 1°.

the right of the arrested person to be produced before a Magistrate to the cases of arrest on a warrant.

{e) Right to consult a legal practitioner.—Article *zz(i)* of the Constitution provides that no person who is arrested shall be denied the right to consult a legal practitioner of his choice. Further, as has been held by the Supreme Court the State is under a constitutional mandate (implicit in Art. 21) to provide free-legal aid to an indigent accused person, and this constitutional obligation to provide legal aid does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate, as also when he is remanded from time to time.[56] It has been held by the Supreme Court that non-compliance with this requirement and failure to inform the accused of this right would vitiate the trial.[57] Section 303 also provides that any person against whom proceedings are instituted under the Code may of right be defended by a pleader of his choice. The right of an arrested person to consult his lawyer begins from the moment of his arrest.[58] The consultation with the lawyer may be in the presence of police officer but not within his hearing.[59] [60] These matters will be discussed again later.

(ei) Right of an arrested indigent person to free legal aid and to be informed about it.—In *Khatri* (2) v. *State of Bihar*[60], the Supreme Court has held that the State is under a constitutional mandate (implicit in Art. 21} to provide free legal aid to an indigent accused person, and that this constitutional obligation to provide legal aid does not arise only when the trial commences but also when the accused is for the first time produced before the Magistrate as also when he is remanded from time to time. However, this constitutional right of an indigent accused to get free legal and may prove to be illusory unless he is promptly and duly informed about it by the court when he is produced before it. The Supreme Court has therefore cast a duty on all Magistrates and courts to inform the indigent accused about his right to get free legal aid.[61]

56. *Khatri (z)* v. *State of Bihar,* (1981) 1 SCC 627, 631:
57. *Suk Das* v . *UT of Arunachal Pradesh,* (1986) 2 SCC 401: 1986 SCC
58. *Llewelyn Evans,*
59. *Sunday Singu*
60. (1981) *x* SCC 627:
61. See also, *Mohd. Apnal Amir*

The Apex Court has gone a step further in *Suk Das* v. *UT of Arunachal Pradesh*[62], wherein it has been categorically laid down that this constitutional right cannot be denied if the accused failed to apply for it. It is clear that unless refused* failure to provide free legal aid to an indigent accused would vitiate the trial entailing setting aside of the conviction and sentence.

{f) Right to be examined by a medical practitioner.—Section 54 has been amended as already discussed. This section empowers the court to get the arrested person medically examined.

While Section 53 enables a police officer to compel an arrested person to undergo a medical examination with a view to facilitate investigation, Section 54 gives the accused the right to have himself medically examined to enable him to defend and protect himself properly. It is considered desirable and necessary "that a person who is arrested should be given the right to have his body examined by a medical officer when he is produced before a Magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subjected to physical injury".[62 63]

According to the Supreme Court, the arrested accused person must be informed by the Magistrate about his right to be medically examined in terms of Section 54.[62 63 64] In case of the examination taking place at the instance of the accused under sub-section (1} a copy shall be given to him.[65] It has been laid down in Section 54-A that on the request of a police officer in charge of the station, a court having jurisdiction can require an accused to subject himself for identification by others if it is found necessary for the investigation of the offence.[66]

The expression "registered medical practitioner" shall have the same meaning as has been mentioned in the Explanation to Section 53.

Non-compliance of this important provision by the magistrates has prompted the Delhi High Court to issue directions making it obligatory for the Magistrates to ask the arrested person as to whether he has any complaint of torture or maltreatment in police custody. The High Court

62. (1986) 2 SCC 401: 1986 SCC (Cri) 166: 1986 Cri LJ 1084.

63. joint Committee Report, p. ix.

64. *Sbeela Barse* v.

65. *See,* Ss. 53-A and

66. *See.* S. 54-A *his.* by Act 25 of 2005. It has been brought into force from

has also directed the Magistrates to inform the accused of his right under Section 54 to be medically examined as it is his ignorance of this right which makes him unable to exercise *it.*[67]

The salutary principle that the medical examination of a female should be made by a female medical practitioner has been embodied in Section 53(2). Similar provision has now been expressly made in Section 54 also.

In order to have transparency in the accused-police relations the Supreme Court in *Joginder Kumar* v. *State of U.P.*[68] *(Joginder Kumar)* formulated the following rules:

{/} An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare, told, as far as is practicable that he has been arrested and where he Is being detained.

(ii) The police officer shall inform the arrested person when he is brought to the police station of this right.

{Hi) An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1} enforced strictly.

The frequent instances of police atrocities and custodial deaths have prompted the Supreme Court to have a review of its decisions like *Joginder Kumar*[69], *NUabati Bebera* v. *State of Orissa*[70], *State of M.P.* v. *Shyamsunder Trivedi*[71], and issue some instructions in *D.K. Basu*[72], to be followed in all cases of arrest or detention. These have since been incorporated In various provisions of the Code discussed above.

Failure to comply with the above provisions would entail departmental action. These are applicable to the arrests made by the officers like Customs Officers, Coastal Guard, BSF, etc.

6.6 Consequences of non-compliance with the provisions relating to arrest

{i) A trial will not be void simply because the provisions relating to arrest have not been fully complied with. If the court has jurisdiction to try an offence, any illegality or irregularity in arrest will not oust the jurisdiction of the court to try the offence.[73] The question whether the

67. *Mukesh Kumar v. State,* 1990 Cri LJ 1913 (Del),
68. (1994) 4 SCC 2.60: 1994 SCC (Cri) 1172.
69. *Ibid.*
70. {1993) 2. SCC 746: 1993 SCC (Cri) 527.
71. (1995) 4 SCC *z6z:* 1995 SCC (Cri) 715.
72. *D.K. Basu* v. *State ofW.B.,* (1997) 6 SCC 642; 1997 Cri LJ 3525.
73. *Emperor* v. *Vinayak Damodar Savarkar,* ILR (1920) 35 Bom 225; *Emperor* v. *Madho Dhobi}* ILR (1903) 31 Cal 557; *P.L. jaitley* v. *Chief Justice, Allahabad,* (1946) 47 Cri LJ 294: AIR 1945 Oudh 266, 268; *Parbhu v. Emperor,* (1945) 46 Cri Lj 119: AIR 1944 PC 73; *Mobarik* Ali *Ahmed* v. *State of Bombay,* 1957 Cri LJ 1346: AIR 1957 SC 857, 866.

police officer making the arrest was acting within or beyond his powers in effecting the arrest, does not affect the question whether the accused person was guilty or not guilty of the offence with which he is charged.[74]

(ii) Though the illegality or irregularity in making an arrest would not vitiate the trial of the arrested person, it would be quite material if such person is prosecuted on a charge of resistance to or escape from lawful custody.[75]

{Hi) If a private person attempts to make an illegal arrest, the person against whom such attempt is made has every right to protect himself and to exercise his right of private defence in accordance with the provisions contained in Sections 96 to 106 IPC.[76] If the person making an illegal arrest is a police officer or a public servant, then the right of private defence against such police officer or public servant will not be as wide as it is against a private person, and would be subject to the restrictions contained in Section 99 IPC.

{Hi) If a public servant having authority to make arrests, knowingly exercises that authority in contravention of law and effects an illegal arrest he can be prosecuted for an offence under Section zzo IPC. Apart from this special provision, *cmy* person who illegally arrests another is punishable under Section 342 IPC, for wrongful confinement.[77] [78]

(v) If the arrest is illegal, it is a sort of false imprisonment and the person making such arrest exposes himself to a suit for damages in a civil court.[7S] [78]

It may be mentioned here that the provisions regarding arrest cannot be by-passed by alleging that there was no arrest but only informal detention. Informal detention or restraint of any kind by the police is not authorised by law.[79] "It is intolerable that the police should pursue the investigation of crime, by defying all the provisions of the law for the protection of the liberty of the citizen, under the colourable pretension that no actual arrest has been made, when, to all intents and purposes, a person has been in their custody."[80]

74. ***Subramania Che tty, re,*** (1941} 41 Cri LJ 310(1): AIR 194 x Mad 181; ***Nagarmal Jankiram, re,*** {1942) 43 Cri Lj 89: AIR 1941 Nag 338, 339; *Emperor* v. *Ravalu Kesigadu,* ILR *26* Mad 124.

75. ***See.*** Ss. 224, 115, 225-B IPC; see also, ***jagannath*** v. ***Emperor,*** (1932) 33 Cri LJ 887: AIR 1932 All 227; ***Appasami***

76. ***AbdulAziz*** v. ***Emperor***, A IR 1933

77. ***Anani Prasad Ray*** v. ***Emperor.*** {1926} 27 Cri LJ 1378, 1380-81 (Par); *Sharifbai* v. *Abdul Razak,* AIR 1961 Bom 42.

78. *Anowar Hussain* v. *A joy Kumar Mukherjee.* AIR 1965 SC 1651: {1965) 2 Cri LJ

79. *Empress* v. *Madar,* 1885 AWN 59; *Queen Empress* v. *Gobardhan,* ILR (1887) 9 All 528, 566.

80. R. v. ***Basooram Dass,*** 19 WR 36.

Chapter 7

Pre-trial Procedure: Search, Seizure and Production of Materials

Object of the chapter 7.1

Documents and other material objects relevant for any investigation, inquiry or trial should be available to the agencies conducting such proceedings. If any person in possession or control of any such relevant documents or things does not cooperate with these agencies and fails to produce the things required, the law will have to devise coercive methods for obtaining these material objects for the purposes of proper investigation, inquiry or trial. The Code, therefore, provides initially for a summons to produce any documents or things; but if this method fails or is apprehended to fail, the court can issue orders to the police for the search and seizure of such documents or things. The Code also empowers the court to issue a warrant for a general search of any place for the purposes of any inquiry or trial, or to issue warrants for the search of places suspected to contain stolen property, counterfeit coins or currency notes Gr stamps, obscene objects and such other objectionable materials. The exigencies of the investigation proceedings may sometimes require the immediate search of a place, and the Code in such cases empowers the police to make a search even without obtaining a warrant from a Magistrate.

A coercive search of any place is an encroachment upon the rights of the occupant of the place. But even in a free society like ours, such encroachments will have to be tolerated in the larger interests of the society. The provisions in the Code strive to strike a balance between the interests of the individual and of the society by providing certain safeguards in favour of the individual. It has been observed, "An Indian citizen's house, it must always be remembered, is his castle, because next to his personal freedom

comes the freedom of his home, just as a citizen cannot be deprived of his personal liberty except under authority of law, similarly, no officer of the State has a prerogative right to forcibly enter a citizen's house except under the authority of law."[1]

While thus the Code incorporates various provisions enabling the investigating authorities to procure evidence in respect of crimes committed in India subject to the restrictions aforesaid, till recently there was no provision in the Code enabling the investigating authorities to collect evidence available in a foreign country in respect of crimes committed by Indian citizens. In order to fill this gap the Code was amended in February 1990, and two sections *viz.* Sections *i66~A* and *i66~B* have since been incorporated.[2]

The present chapter deals with the extent and limit of legal authority to procure evidence to make a search and to seize things for the purposes of investigation, inquiry or trial.

7.2 Procurement of evidence from and for foreign investigating agencies

Since the investigating authorities were handicapped in collecting evidence available in a foreign country in respect of crimes committed by Indian citizens, Parliament has since enacted Sections 166-A and 166-B as follows:

Letter of request to competent authority for investigation in a country or place

166-A. [3][(i) Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter.

(2.) The letter of request shall be transmitted In such manner as the Central Government may specify in this behalf.

{3} Every statement recorded or document or thing received under subsection {1} shall be deemed to be the evidence collected during the

1. ***State*** v. ***Bhawani Singh,*** AIR 1968 Dei 2,08, ***zx*** i(FB); see also, ***Melicio Fernandes v, Mohan,*** 1966 Cri Lj 12.58: AIR 1966 Goa 2.3, 32.;
2. ***See,*** the Criminal Procedure Code
3. Ss. 166-A and 166-B ***ins.*** by Act 10 of 1990, S. ***z***

166-B. (1} Upon receipt of a letter of request from a Court or an authority in a country or place outside India competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to an office under investigation in that country or place, the Central Government may, if it thinks fit,— *Letter of request from a country or place outside India to a Court or an authority for investigation in India*

(/) forward the same to the Chief Metropolitan Magistrate or Chief Judicial Magistrate or such Metropolitan Magistrate or Judicial Magistrate as he may appoint in this behalf, who shall thereupon summon the person before him and record his statement or cause the document or thing to be produced; or *[ii)* send the letter to any police officer for investigation, who shall thereupon investigate into the offence in the same manner, as if the offence had been committed within India.

(z) All the evidence taken or collected under sub-section (1), or authenticated copies thereof or the thing so collected, shall be forwarded by the Magistrate or police officer, as the case may be, to the Central Government for transmission to the Court or the authority issuing the letter of request, in such manner as the Central Government may deem fit.]

Section 166-A enables the investigating authorities and the criminal courts to issue letter of request to their counterparts in foreign countries to collect and transmit evidence in respect of crimes committed by Indian citizens. Section 166-B enacts the principle of reciprocity. It enables the foreign agencies or courts to send request for collection and transmission of evidence in respect of crimes committed by their citizens in India.

Order or summons to produce document or other thing

A police officer or a court may, under certain circumstances, issue an order or a summons for the production of any document or other thing if such production is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under the Code. This has been provided by Section 91 which is as follows:

91. (1) Whenever any Court or any officer in charge of a police station considers that the production

of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order. *73*

(z) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed— *Summons to produce document or other*

(a) to affect Sections 12.3 and 12.4 of the Indian Evidence Act, 1872 (1 of 1872), or the Banker's Books Evidence Act, 1891 {13 of 1891); or *{b}* to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

It has been ruled that the court before issuing a search warrant must have reasons to believe that the persons to whom summons under Section 91 has to issue would not produce the document. The court further ruled that the expression "reasons to believe" would mean that there must be some justifiable ground for the court to form that opinion.[4]

A question might arise whether a summons or an order under this section could be issued to an accused person. The language of the section is general and prima facie apt to include an accused person. But there are indications that the legislature did not intend to include an accused person. The words "attend and produce" are rather inept to cover the case of an accused person who is necessarily required to attend the court even otherwise. It would be an odd procedure for a court to issue a summons to an accused person present in court "to attend and produce" a document. It would be still more odd for a public officer to issue a written order to an accused person in his custody to "attend and produce" a document. *Secondly,* if Section 91 is so construed as to include an accused person, such a construction is likely to lead to grave hardship for the accused and make investigation unfair to him.[5] Moreover, the section if construed so widely would be violative of Article 20(3} of the Constitution which embodies the principle of protection against compulsion of self-incrimination. For, that article has been construed to mean that an accused person cannot be compelled to disclose document which are incriminating and based on his knowledge.[6] The courts, for all these reasons, have taken the view that Section 91, on its true construction, does not apply to an accused person.[7] In *V.S. Kuttan Pillai* v. *Ramakrishnan*[8], the Supreme Court took note of the conflict between the observations in the *M.P. Sharma case*[9] as reconsidered in the *Kathi Kalu Oghad case*[10] and the one in *State of*

4. *Bimal Kanti* v. *M. Chandrasekhar Kao,* 1986 Cri Lj 689 (Ori).
5. *State of Gujarat* v. *Shyamlal,* (1965} 2 Cri LJ 256: AIR 1965 SC 1251, 1259-60. Also see, V. *Gopalakrishnan Nayanar* v. K.V. *Sasidharan Nambiar,* 1996 Cri LJ 1302
6. *Ibid. See also* observations of the Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad,* {1961} 2 Cri LJ 856: AIR 1961SC 1808; *M.P. Sharma* v. *Satish Chandra,* 1954 Cri LJ S65: AIR 1954 SC 300, 306; *Bimal Kanti* v. *M.*
7. *State of Gujarat* v. *Shyamlal,* (1965) 2 Cri LJ 256: AIR 1965 SC 1251, 1260; *Melicio Fernandes v. Mohan,* X966 Cri Lj 1258: AIR 1966 Goa 23, 32; *Vinayak* v. *Vikram,* 1979 Cri Lj 71 (Bom). See also, M. *Kalanithi Maran* v. *State,* 2004 Cri LJ 1288
8. (1980) x SCC 264: 1980 SCC (Cri) 226: 1980 Cri Lj 196.
9. *State of Gujarat* v. *Shyamlal,* (1965) 2 Cri Lj 256: AIR 1965 SC 1251, 1259-60. Also see, *V. Gopalakrishnan Nayanar* v. *K.V. Sasidharan Nambiar,* 1996 Cri Lj 1302 (Ker); *see also* observations of the Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad,* (1961) 2 Cri LJ 856: AIR 1961SC 1808; *M.P. Sharma* v. *Satish*

Gujarat v. *Shyamlal*[11]. However, as that case was not directly relatabie to a summons issued under Section 91(1), it was not considered necessary to refer the matter to a larger Bench to resolve the conflict.

It has been ruled that merely because an order made by an investigating officer to produce books of accounts and other things would cause inconvenience to the person from whom it is summoned, it could not be said that the order is beyond the purview of Section 91.[12]

The language of Section 91 is very wide. If it were to be taken literally, it might appear that anything whatever which is capable of being produced

i. e. anything tangible and moveable, might be ordered to be produced if the court chose to consider its production necessary or desirable for the purposes of any proceeding before it. But no such absolute discretion can be contemplated. It has been held that the Magistrate does not have power to order production of money by way of converting it into a draft.[13] But it can summon production of documents for inquiry.[14] The court's discretion must be exercised judicially.[15] The word "thing" referred to in the section is a physical object or material and does not refer to an abstract thing. It cannot be said that issuing of summons to a person for the purpose of taking his specimen signature or handwriting is for the production of any document or a thing within the meaning of Section 91.[16] It has been held that the court has inherent jurisdiction to call upon a person present in the court to produce a document which is in his possession at the time, and it Is in such cases unnecessary to insist on the strict compliance with the conditions of Section 91.[17] The Supreme Court has clarified that case diary is a document under Section 91 and that it can be summoned by the court.[18] It has also been ruled[19] by the Supreme Court that the power under Section 91 enables the court to summon records in the possession of prosecution. The court observed:

> To claim documents within the purview of scope of Sections 2.07, 2.43 read with the provisions of Section 173 in its entirety and powers of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statements and documents which the prosecution has collected during investigation and upon which
> they rely.[20]

11. (1965) 2 Cri Lj 256: AIR 1965 SC 1251, 1259-1260. Also see, V. *Gopalakrishnan*
12. *Surendra Mohan* v. *K.P. Mani,* 1986 Cri LJ 1324
13. *Jagdisb Prasad Sharma* v. *State of Bihar,* 1988 Cri LJ
14. *S.K. S nigh a l* v. *State ofM.P.,* 1997 Cri LJ 3145 (MPj; V',5. *Geetha* v. *Aliyarkunju,* 1997 Cri LJ 479 (Ker);
15. *Lloyds Bank Ltd., re,* AIR 1934 Bom 74, 76; *Ajay Mukherji* v. *State,* 1971 Cri Lj 1329 (Cal).
16. *T. Subhiah* v. *Ramaswamy,* AIR 1970 Mad 85, 86.
17. *Ganga Ram* v. *Habib Ullah,* AIR 1936 All 212, 215.
18. *Stale of Kerala* v. *Babu,* {1999) 4 SCC 621: 1999 SCC
19. V.JC *Sasikala* v. *State,* {2012) 9 SCC 771: (2013) 1
20. *Ibid,* para. 220,

A person who has not been cited as a witness in the proceedings but appears in the court in pursuance of the summons under Section 91(1) does not thereby become a witness and therefore cannot be examined and cross examined by the court. Section 139, Evidence Act clearly provides that even if such a person produces the document he does not thereby become a witness by the mere production of the document.[21]

If a person fails to comply with the summons without any reasonable excuse he will expose himself to the penal consequences contemplated by Section 349 of the Code. Further, intentional omission to produce a document as required by the section will also be punishable under Section 175, Penal Code, i860 (IPC). It is obvious that before a person is punished for failure to comply with the summons or order issued under the section, it will have to be proved that the conditions for issuing the summons or order have been fulfilled and that the summons or order has been duly served on such person.

Clause *(b)* of sub-section (3) of Section 91 provides that the section shall not apply to any document or thing in the custody of the postal or telegraph authorities. In respect of these matters the Code provides a separate Section 92 which is as follows:

92. (r) If any document, parcel or thing in the custody of a postal or telegraph authority is, in the opinion of the District Magistrate, Chief judicial Magistrate, Court of Session or High Court wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the postal or telegraph authority, as the case may be, to deliver the document, parcel or thing to such person as the Magistrate or Court directs.

'Procedure as to letters and telegrams

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, whether Executive or judicial, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the postal or telegraph authority, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the order of a District Magistrate, Chief judicial Magistrate or Court under sub-section {1}.

The authorities mentioned in Section 92 cannot be directed to produce the document or thing in court or before the investigating officer. They can only be directed to deliver the same to a person nominated by the Magistrate or a court, or to detain them pending order.[22] Sections 91 and 92 must be read together as they form one group. It is therefore obvious that no order under Section 92(1) can be passed in respect of a parcel, document or thing not in the custody of the postal or telegraph authorities at the time of passing of the order but which are expected to be received in future. It is also significant that before the District Magistrate passes

21. *Parmeshwan Devi* v. *State,* (1977) 1 SCC 169: 1977 SCC {Cri) 74, *76:* 1977 Cri IJ 245.

22. *Textile Traders Syndicate* v. *State of* I'. P., i960 Cri Lj 871: AIR i960 All 405,

an order under Section 92(1) he has to be satisfied whether the production of the document or thing is necessary or desirable for the purposes of inquiry, investigation or any other proceeding. Prima facie, there can be no such consideration by the District Magistrate in respect of a document which is not in existence at the time of the passing of the order and which may come into existence subsequently and may be received by the postal or telegraph authorities.[23] However, as regards Section 92(2}, in the very nature of things it is not possible to specify the documents, parcels or things that should be detained by the Postal and Telegraph Department, because unless the investigating officer makes some prima facie examination it is not possible for him to determine whether any particular document, parcel, etc., would be wanted for the purposes of investigation and with regard to which orders may be obtained under Section 92(1}. Therefore, it has been held that an omnibus order by the District Superintendent of Police under Section 92(2) directing the Postal and Telegraph Department to detain the entire mail addressed to a person was not illegal.[24]

Search-warrant 7.4

A search-warrant is a written authority given to a police officer or other person by a competent Magistrate or a court for the search of any place either generally or for specified things or documents or for persons wrongfully detained. A search is a coercive method and involves invasion of the sanctity and privacy of a citizen's home or premises. It has therefore been repeatedly observed that the power to issue search-warrant should be exercised with all the care and circumspection.[25] According to the provisions of the Code, search-warrants may be issued under six circumstances.

Three of the circumstances are covered by Section 93 which provides:

When search-warrant may be issued

93. (i)(a) Where any Court has reason to believe that a person to whom a summons or order under Section 91 or a requisition under sub-section (1) of Section 92. has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

{b} where such document or thing is not known to the Court to be in the possession of any person, or

(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search-warrant; and the person to whom such

23. *Amar Singh* v. *State,* AIR 1965 Raj 160, 162; *Textile Traders* ***Syndicate*** v. ***State of U.P.,*** 1960 Cri Lj 871: AIR i960 AH 405,

24. *Kalias h* v. *Supt. of Post Offices. Delhi,* 1960 Cri LJ 1134: AIR i960 Punj 412; see also. *Textile Traders Syndicate* v. *State ofU.P.*.

25. ***Kalinga Tubes Ltd.*** v. ***D. Suri,*** (1953) 54 Cri Lj 1041: AIR 1953 Ori 153, 155.
Also

directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(a) The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.

(a) According to Section 93(1 }{#) a search-warrant may be issued where a court has reason to believe that a person to whom a summons or order under Section 91 or a requisition under Section 92(1) has been addressed will not produce the document or thing as required by such summons or requisition.

If a summons or order cannot be issued under Section 91, there cannot obviously be a search-warrant under this clause. As seen earlier in para. 7.3, Section 91 on its literal construction does not apply to an accused person. Therefore a search-warrant under this clause cannot be issued in respect of documents or property known to be in possession of the accused person.[36] However a general search or inspection in such a situation is legally permissible under Section 93(i}(c) which would be discussed later.

The words "reason to believe" in this clause would be construed to mean as "sufficient cause to believe" positively,[37] in other words, the Magistrate or court must himself or itself be satisfied that there is necessity for the search-warrant to be issued otherwise the thing would not be produced.[26] [27]
28

The word "may" in sub-section {1) confers discretion on court to issue a search-warrant. This discretion is not unfettered. In the words of Lord Mansfield, "Discretion when applied to a Court of justice is sound discretion guided by law; it must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful; but legal and regular." The court is not bound to issue a search-warrant whenever it is asked for; it may direct investigation by the police before issuing the process or search-warrant.[26] [27] [28] [29] The words "reason to believe" coupled with other words contemplate an objective determination based on intelligent care and deliberation involving judicial review as distinguished from a purely subjective consideration.

26. V.S. *Kuttan Filial* v. *Ramakris*

27. *Melicio Fernandes* v. *Mohan,* 1966 Cri LJ 1258; AIR 1966

28. *Manicklal* v. *State,* (1953) 54

29. *Melicio Fernandes* v.

This function being judicial, it necessarily follows that the court has to apply its mind judicially.[50]

(b) A search-warrant may also be issued where any document or other thing necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under the Code is not known to the court to be in the possession of any person. [S. 93(1)*{b))*

(c) A search-warrant for a general search or inspection can be issued by a court where it considers that the purposes of any inquiry, trial or other proceedings under the Code would be served by such a general search or inspection. [S. 93(i)(c)]

When such a general search-warrant is issued, in execution of it the premises even in possession of the accused can be searched and documents found therein can be seized irrespective of the fact that the documents may contain some statement made by the accused upon his personal knowledge and which when proved may have the tendency to incriminate the accused. However such a search and seizure under Section 93(i)(c) will not have even the remotest tendency to compel the accused to incriminate himself. A passive submission to search cannot be styled as a compulsion on the accused to submit to search and if anything is recovered during such search which may provide incriminating evidence against the accused it cannot be styled as a compelled testimony.[30 31]

A general search means a search not in respect of any specific documents or things which are considered necessary for the purpose of any proceedings under the Code, but a roving inquiry for the purpose of discovering documents or things which might involve persons in criminal liability.[30 31 32] A general search should not be confused with a general warrant which was a process formerly issued from the State Secretary's Office in England to take up (without naming any persons) the author, printer and publisher of such obscene and seditious libels as were specified in it. Such general warrants have been declared illegal and void in England, while they have never existed here in India at any point of time.

The word "inspection" in this clause (c) may be taken to relate only to the inspection of a locality and place and not of the documents.

While for specified things and documents search-warrants under the above two clauses *{a)* and (b) could be issued for the purposes of any investigation, inquiry, trial or other proceeding under the Code, a warrant for a general search and inspection under clause (c) can apparently be issued only for the purposes of inquiry, trial or other proceeding under the Code. Investigation, inquiry, and trial are quite different things and represent different stages of criminal process. This will be clear from the

30. *Ibid,* 27.

31. V.5. *Rattan Pillai* v. *Ramakrisbnan, (1980}* 1 SCC 264: 1980 SCC (Crt) 226: 1980 Cri Lj 196. Also see. *Rajmal Heeralal Jain* v.

32. *Paresh Chandra Sen G*upta v. *jogendra Nath Roy.* AIR 1927 Cal 93.

Definitions

definitions of "inquiry" and "investigation" given in clauses (g) and *(h)* of Section 2. They are:

2. (g) "inquiry" means every inquiry, other than a trial, conducted under this

Code by a Magistrate or Court;

(b) "investigation" includes ail the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

The omission of the word "investigation" in Section 513(1 *)(c)* suggests that the legislature did not provide for the issuing of a warrant for general search for the purpose of an investigation- A Magistrate who utilises this clause with a view to help the police in the investigation of an offence does something which the Code does not sanction.[33] However it has been held that the phrase "for purposes of" in clause *(c)* in relation to inquiry, trial or other proceedings under the Code, is a very comprehensive term and should not be construed as meaning "during the pendency of" such proceedings. The stage at which a warrant for general search is issued may be prior to the initiation of any proceeding under the Code by way of inquiry or trial. What is necessary in such cases is that the court or Magistrate should be reasonably satisfied that the search is likely to be a link in the chain which in the normal course will lead to an inquiry or trial under the Code if the expected material is found on the sea rch, and that there are reasonable grounds for such expectation.[34]

Issue of search-warrant being in the discretion of the Magistrate it would be reasonable to expect of the Magistrate to give reasons which swayed his discretion in favour of granting the request. A clear application of his mind by the learned Magistrate must be discernible in the order of granting the search-warrant.[35]

Form No. 10 of Schedule II is the prescribed form in which a search- warrant is to be issued. It is as given below:

FORM NO. **10** [See, Section **93**]

WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE To *{na^ne and designation of the police officer or other person or persons who is or are to execute the warrant).*

Whereas information has been laid (or complaint has been made)

before me of the commission *(or* suspected commission) of the offence of

Hosbide v. *Emperor,* (1940) 41 Cri LJ 32,9: AIR 1940 Cal 97, TOO.

Kalinga Tubes Ltd. v. D. *Suri,* (1953) 54 Cri Lj 1041: AIR 1953 Ori 153, 157, 158; *Meltcio Fernandes* v. *Mohan,* 1966 Cri LJ 1258: AIR 1966 Goa 2.3, 32.; *Kaverappa* v. *Sankannayya,* AIR 1965 Mys 214, 119; See also, *Hosbide* v. *Emperor,* (1940) 4T Cri LJ 329: AIR V.S. *Kuttan Filial V, Ramakrishnan,* (1980) *1* SCC 264: 1989 SCC (Cri) 226: 1980 Cri Lj 196. *Also see* observations in *Chttriaram Aggarwal* v, *Agganval Sweet Corner,* 1990 Cri LJ

of *(specify the thing clearly)* IS essential to the inquiry now being made (or about to be made} into the said offence *(or* suspected offence};

This is to authorise and require you to search for the said (the *thing specified)* in. the *(describe the house or place or part thereofto which the search is to be confined*}, and if found, to produce the sa^Qe
forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it. immediately upon its execution.

Dated, this day of , 20

{Seal of the Court) *(Signature)*

As the form requires that a search-warrant must "specify the thing clearly", a question might be raised as to how this form can be used when a warrant for general search is to be issued under Section 93(i)(t:}. But Section 476 permits such variations in the forms set forth in the Second Schedule as the circumstances of each case may require. Therefore a warrant for general search can be issued in Form 10 and the words "specify the thing clearly" appearing therein may be ignored in case of such warrant.

(d) A warrant for a search of a place suspected to contain stolen property, forged documents, etc. can be issued under Section 94 which is given below:

Search of place suspected to contain stolen property, forged documents, etc.

94. (1} If a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary,
has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place,

(b) to search the same in the manner specified in the warrant,

(c) to take possession of any property or article therein found w-hich he
reasonably suspects to be stolen property or objectionable article to
which this section applies,

{d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate,
or otherwise to dispose of it in some place of safety,

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.

(z) The objectionable articles to which this section applies are—

(a) counterfeit coin;

(/E?} pieces of metal made in contravention of the Metal Tokens Act,

,00$_9$ ($_0$f ,00$_9$) $_{or}$ b$_{roug}$ht :$_n$t$_9$ i$_n$d:$_{a\ c9n}$t$_{rav9n}$ti$_{9n\ 9}$f $_{any}$

(d) forged documents;
(e) false seals;
if) obscene objects referred to in Section 29a of the Indian Penal Code {45 of i860);
(g) instruments or materials used for the production of any of the articles mentioned in clauses *(a)* to (/*).

The section makes it clear that *i)* the search-warrant can be issued only by a District Magistrate, Sub-Divisional Magistrate, or a Magistrate of the First Class; *ii)* the person authorised to search must be a police officer above the rank of a constable; and *in)* before a warrant is issued the Magistrate concerned must have reason to believe that the place is used for the deposit or sale of stolen property etc.[36]

In applying Section 94 the Magistrate should have information. He must also conduct the inquiry as he thinks necessary. On the basis of such inquiry he must have reason to believe that the place is used for deposit of stolen property. The order must therefore show that he applied his mind.[37]

Seizure under Section 94 of a vehicle which was sold on hire-purchase basis and in respect of which a civil dispute was pending, was disapproved.[38]

The warrant is to be issued in Form 11 of the Second Schedule which is as follows:

FORM NO. 11
[See, Section 94]
wARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

To *(name and designation of a police officer above the rank of a constable)*

Whereas information has been laid before me, and on due inquiry thereupon had, I have been led to believe that the *(describe the house or other place)* is used as a place for the deposit *(or* sale) of stolen property *(or if for either of the other purposes expressed in the section, state the purpose in the words of the section);*

This is to authorise and require you to enter the said house *(or other place)* with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said house *{or other place, or if the search is to be confined to a part specify the part clearly),* and to seize and take possession of any property (or documents, or stamps, or seals, or coins, *or* obscene objects, *(as the case may be) [add, when the case requires it)* and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, or counterfeit stamps, or false seals, or counterfeit coins or counterfeit currency notes *(as the case may be),* and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this _____ day of_____ , 20 _____ .

36. *See* observations in *Dinesb*
37. *Gangadharan* v. *Kochappi*
38. See, *Sabal Chandra Samal v.*

(e) Where any newspaper, book or any document contains any matter the publication of which is punishable under Section IZ4-A (Sedition), or Section 153-A (Promoting enmity between classes) or Section 153-B (Imputations, assertions prejudicial to national integration) or Section 292 {Sale etc. of obscene books etc.) or Section 293 (Sale etc. of obscene objects to young persons) or Section 295-A (Maliciously insulting the religion or the religious beliefs of any class) of the IPC, Section 95 of the Code empowers the State Government that it may, by notification, declare every copy of the newspaper containing such matter and every copy of such book or other document to be forfeited to the government. Upon such a declaration of forfeiture any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue of the newspaper or any such book or other documents may be, or may be .reasonably suspected to be. [S. 95(1)] *if)* If any person is confined under such circumstances that the confinement amounts to an offence, a search-warrant may be issued for the person so confined. This has been provided by Section 97 which reads as follows:

> 97. If any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Search for persons wrongfully confined

The warrant under this section is in the nature of a writ of habeas corpus for rescue of a wrongfully confined person by intervention of police directed by a magisterial order.[59] In India, the writ of habeas corpus is probably never used by a husband to regain his wife and the alternative remedy under Section 97 is always used.[39 40] Before a warrant is issued under this section the Magistrate has to satisfy himself that a person has been wrongfully detained.[39 40 41] However the section does not cast any obligation on the Magistrate to hold a detailed inquiry or to record such

39. *Jay Engg. Works* v. *State,* AIR 1968 Cal 407,468. Also see, *Zabirul Hassan* v. *State ofU.P.,* 1988 Cri LJ 230 (AH).

40. *Mohd. Ikram Hussain* v. *State ofU.P.,* {1964) ² Cri Lj 590: AIR 1964 SC 1625.

41. *Anuara Begum* v. *Habil Mea,* (1962) 2 Cri Lj 159. 160 (Tripura JCC): *Khaliqan* v. *Emperor,* (1946) 47

findings which are necessary after adjudication. Nor is there any right for the affected party to be heard before the Magistrate issues the search- warrant. It came to be invoked by a father to rescue his married daughter from wrongful confinement by her in-laws.[42] However, it was held inapplicable to a case where after the S.D.M.'s rejection of the mother's prayer for search of her son who was with his father, the Sessions Judge ordered search and subsequently custody of the boy with the mother. The High Court dismissed the revision petition, the Supreme Court ruled that Section 97 is not prima facie attracted to the facts and circumstances of the case when the child was living with his own father. The Supreme Court has also turned down the husband's request for a search-warrant under Section 97 for his children who were with his wife, as the mother is the natural guardian of her children.[43] In case of a person wrongfully confined by a *gherao,* a warrant can be issued under this section for his rescue.[44]

An additional special provision has been made by Section 98 to compel restoration of abducted females. The section reads as follows:

> 98. Upon complaint made on oath of the abduction or unlawful detention of a woman, or a female child under the age of eighteen years, for any unlawful purpose, a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

Power to compel restoration of abducted females

The section is intended to give immediate relief to a woman or girl abducted or detained for any unlawful purpose.[45] An action under this section cannot be taken except upon a complaint on oath;[46] however a protracted inquiry is not contemplated by the section as that would defeat the object of the provision.[47] The only order that can be passed under this section is one to restore the female to her liberty or to her lawful guardian.[48] To issue a warrant for the arrest of the female is not permissible under this section but that could be possible under Section py.[49]

42. *Pravinsingh* v.
43. *Ra mes b* v.
44. *fay Engg. Works*
45. *Abraham* v.
46. *Moti v. Beni,* AIR
47. *Dhapu* v. *Puri*
48. *Abdul Jalil Khan*
49. *Khuda Bux* v.

Constitutional validity of search-warrants 7.5

A question might be raised as to the constitutional validity of a search-warrant where it relates to the documents or things in possession of the accused person or where the warrant is for a general search or inspection of the premises in possession or occupation of the accused person. In the preceding para. 7.3 it has been considered that a court is precluded from issuing a summons to an accused person to produce any document or thing in his custody as that would be violative of Article 2.0(3} °f the Constitution.

It is also seen in para. 7.4 that a search-warrant under Section 93(i)(<z) could be issued only in cases -where a summons has been issued or might have been issued. Therefore, a search-warrant for the documents or things in possession of the accused could not be issued. However, search-warrant issued under Section 93(1 *){b)* for particular things or documents not known to the court to be in possession of any person, or a warrant for a general search of the premises in possession of the accused person, or a search-warrant under Sections 94, 95 or 97 in respect of any particular property or person in possession or custody of the accused person, cannot be taken to be violative of Article 20(3) of the Constitution which gives protection to the accused person against testimonial compulsion. In these cases the search and consequent seizure of documents or other things are not the acts of the accused person at all, much less his testimonial acts amounting to self-incrimination. Search-warrant is addressed to an officer of the government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense.'[0] It is easy to see how a different view would lead to monstrous results. A person may commit murder and bury the body in the backyard of his house and he may commit burglary and keep the loot in an almirah inside his house; or he may commit cheating and keep the proceeds thereof in a drawer of his writing desk, and they would all be as safe as if they had been lodged in the Bank of England. Such disastrous consequences could never have been intended by any law-maker.

The Constitution is not intended to be a charter for the lawless and there is nothing in Article 20(3} of the Constitution to prevent a search under the provisions of the Code.[55]

General provisions relating to search-warrants *7.6*

Certain provisions applicable in respect of a warrant of arrest have been, by a general rule, made applicable mutatis mutandis to search-warrants [50] [51]

50. *M.P. Sharma* v. *Satish Chandra,* 1954 Cri Lj 865: AIR 1954 SC 300, 302.. See also, V.S. *Kuttan Pillai* v. *Ramakrishnan,* {1980} 1 SCO 264: 1980 SCC (Cri) *226:* 1980 Cri LJ 196.
51. *Sorualingam, re,* {1955) 56 Cri Lj 1602: AIR 1955 Mad 685; *Melicio Fernandes* v. *Mohan,* 1966 Cri LJ 1258: AIR 1966 Goa 23, 32; *M.P. Sharma* v. *Satish Chandra,* 1954 Cri Lj 865: AIR 1954 SC 300.

issued under the six circumstances mentioned in the preceding para. 7.4. This general rule is provided by Section 99 which reads as follows:

Direction, etc. of

99. The provisions of Sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search warrants issued under Sections 93, 94, 95 or 97. Section 38 referred to in the above section provides that a person, other than a police officer, may be aided in the execution of a warrant.[52] Sections 70 and 72 deal with the form of warrant, its duration, and the person to whom it might be directed.[53] Section 74 provides that a warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed. Section 77 makes it clear that a warrant may be executed at any place in India. Sections 78 and 79 explain the procedure to be followed where a warrant is to be executed outside the local jurisdiction of the court issuing it.[54] [55]

7.7 Search of a place without warrant

(a) Magistrate may direct search in his presence.—A Magistrate competent to issue a search-warrant under six circumstances mentioned in the preceding para. 7.4 may direct a search to be made in his presence if he considers it advisable,[55] [56] and in such a case it would not be necessary to formally issue a search-warrant. This is clear from Section 103 which reads as follows:

Magistrate may direct [10]3- Any Magistrate may direct a search to be made in his presence of any *search in his presence* place for the search of which he is competent to issue a search-warrant.

(b) Search by police officer during investigation.—A citizen should have in his house a full and free life undisturbed by executive action."[6] However, in the larger interests of the administration of justice it becomes necessary that public officers engaged in investigations and inquiries relating to offences or suspected offences should be afforded fair and reasonable facilities for searches. The decision as to whether a search of a citizen's house is essential in the larger interests of society ought to be basically a judicial decision. Therefore the duty of balancing the two conflicting considerations in diverse circumstances has been vested in the Magistrate or court issuing search-warrants under the provisions of the

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Code.[57] But Section 165 of the Code has been enacted as an exception to this general law of searches because it is recognised that in certain exceptional emergencies it is necessary to empower responsible police officers to carry out searches without first applying to the courts for authority.[58] The legislature has however attempted to restrict and limit the powers of the police under this section, and has provided the citizens concerned with safeguards in order to prevent the abuse of these povrers. Section 165 is as follows:

Search by police officer

165. (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(z) A police officer proceeding under sub-section (i), shall, If practicable, conduct the search in person.

{3} If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4} The provisions of this Code as to search-warrants and the general provisions as to searches contained in Section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3} shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

An analysis of the section will show that

(i) The power to search a place under this section can be exercised only by a police officer in charge of a police station or other police officer

57. *See* observat

58. *Emperor* v. *Mobd. Shah,* (1947) 48 Cri LJ 161: AIR 1946 Lah

thereupon the subordinate officer shall have authority to conduct the search.

(ii) The search under this section must be for particular things or documents, or specified materials, necessary for the purposes of the investigation. The section does not permit a general search.[A] For instance, where the police officer searches a house for stolen articles generally and not for any articles mentioned by a complainant as having been stolen from him, the search would be considered as a general search and therefore not having legal authority under this section. The word "thing" does not include a configuration of a wall, or the inspection of any place inside a house for the purposes of investigation. A promiscuous entry into houses is not permitted to an investigating officer simply to satisfy himself as to the truth of an allegation made by a complainant or an accused person or a witness.[59] [60]
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{Hi} The police officer must have reasonable grounds for believing that:

(a) any specific thing necessary for the purposes of the investigation may be found in the place within the limits of his police station, and

(b) such thing, in his opinion, cannot otherwise be obtained without undue delay *i.e.* in his opinion it would be too late before a search-warrant is obtained from a Magistrate.

Where lack of time is not a consideration, search without warrant is not proper and the recovery would itself come under suspicion.[61] The section gives power to the police officer to search without warrant if he has "reasonable grounds for believing" and not just "reasonable suspicion" as in Section 4i(i)(zi). The expression "reasonable grounds for believing" is equivalent to "has reason to believe" in Section 93. It means a belief based on some definite facts.[62] This provision is intended to ensure that the searches by the police officers are not arbitrary and are genuinely required in cases where there is no time to approach a Magistrate for a search-warrant.

[iv) A good procedural safeguard against arbitrary searches and against general or roving searches is provided when the section insists that the police officer before proceeding to search a place must record the grounds of his belief as to the necessity of such search and must

59. *Lai Mea* v.
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61. *A.P. K at*
62. *See* obser

also specify in such writing the things for which the search is to be conducted.[63] This would obviate the possibility of a police officer manipulating and choosing his "grounds of belief' after having in fact a general roving search. By requiring the police officer to specify beforehand the article for which the search is to be made, it would also limit the extent of search and would consequently restrict the encroachment upon the privacy of the occupant. For instance, where a police officer intends to search a house for a stolen cycle or scooter and has specified it in writing beforehand, he can hardly be in a position to claim any legal authority under the section to open and search the suit-cases in the house.

The recording of reasons is an important step in the matter of search and to ignore it is to ignore the material part of the provisions governing searches.[64] If the reasons are recorded in the case diary, that would not amount to due compliance with the mandatory provisions of the section as the accused in that case would not be able to claim a copy of the extract of the case diary.[65] The nonrecording of the reasons for search would make the search illegal.[66] An illegal search may entail punishment of the police officer who may be asked to pay compensation to the person whose house has been searched.[67]

{v} Sub-section (5} requires that the copies of record made under subsection (1) or sub-section (3) shall be sent *forthwith* to the nearest Magistrate. This would ensure that these records are not conveniently fabricated after the search to enable the police to justify their conduct suitably. Further, the sub-section requires the Magistrate to furnish, free of cost, to the occupier of the place searched a copy of the entire record so received by him. The occupier thereby gets an adequate opportunity to satisfy himself as to the legality of the search, and in case the search is found to be illegal or improper, the office copy of the record would facilitate the proof of the illegality or impropriety of the search in any proceedings taken against the erring police officer.[68]

(vi) Sub-section (z) directs that the police officer, as far as practicable, is to conduct the search in person. However the rule is to be interpreted reasonably. Where a police officer remained outside

6.3. ***Sohart Lai v. Emperor,*** (1955) 34 Cri L] 568; ***State*** v. ***Satyanarayan Mailik,*** AIR 1965 Ori 136: ***Emperor*** v. ***Mobd. Shah,*** (1947) 48 Cri L] 161: AIR 1946 Lah 456.
64. ***State of Rajasthan*** v. ***Rehman,*** i960 Cri Lj 186: AIR i960 SC zi0.
65. ***Sanchaiia investmetits*** v. ***State of*** W.R.. AIR 1981 Cal 157.
66. *State* v. *Satyanarayan Mailik,* AIR 1965 Ori 136.
67. ***Sharda Singh*** v. ***State of U.P.,*** 1999 Cri Lj 1S80 (All).
68. ***Emperor*** v. ***Mohd. Shah,*** {1947} 48 Cri Lj 161: AIR 1946 Lah 436, 458.

the house while the search was being made inside by some subordinate officer, the search was not held to be illegal.[69]

If, however, the police officer is unable to conduct the search in person, and there is no other person competent to make the search present at the time, then, according to sub-section (3}, he can authorise any subordinate officer to make the search. The sub-section, however, requires that the police officer giving such authority must record his reasons for doing so; the authority given to the subordinate officer must be in writing and it should, as far as possible, specify the place to be searched and the thing for which the search is to be made. A search by a subordinate police officer without such authority is illegal.[70] An oral order given to a subordinate officer is not enough, and the authorisation of the search must always be in writing.[71]

Sub-section {4) provides that the provisions as to search-warrants and the general provisions as to searches contained in Section 100 shall, as far as may be, apply to searches conducted by the police under this section. The provisions of Section 100 have been discussed in the succeeding para. 7.8.

(c) Power to conduct search in the limits of another police station.—Section 166 enables a police officer to effectuate a search of a place located beyond the limits of his own police station, if the exigencies of the situation so require. Section 166 reads as follows:

x66. (1) An officer in charge of a police station or a police officer not being below the rank of sub-inspector making an investigation may require an officer in charge of another police station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station.

When officer in charge of police station may require another to issue search luarrant

(2.) Such officer, on being so required, shall proceed according to the provisions of Section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

{3} Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or a police officer making any investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station in accordance with the provisions of Section 165, as if such place w[r]ere within the limits of his own police station.

69. ***Satagopaia*** v. ***Satrughna Behara,*** {1912,) 15 Cri LJ 763; ***Ujagar Singh*** v. ***Emperor,*** (1932) 33 Cri LJ 492: AIR 1932 Oudh 249.

70. ***Madho Sonar*** v. ***Emperor,*** (1915} 16 Cri LJ 589; ***Idu Mandat*** v. ***Emperor,*** (1905} 6 Cri LJ 439; ***Emperor*** v. ***Brikhban Singh,*** {1915)

71. ***Hira Lai*** v. ***Ramdulare,*** AIR 1935 Nag 237.

(4) Any officer conducting a search under sub-section (3} shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under Section 100, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in sub-sections (1} and (3} of Section 165.

(5) The owner or occupier of the place searched shall, on application, be furnished free of cost with a copy of any record sent to the Magistrate under sub-section (4).

(d) Search for false weights and measures.—Where a police officer in charge of a police station has reason to believe that weights, measures or instruments for weighing which are false, are used or kept in any place, he can inspect and search the place and may seize such weights, measures, etc.

This has been provided by Section 153 which is as follows:

153. (1) Any officer in charge of a police station may, without a -warrant, enter *Inspection of weights* any place within the limits of such station for the purpose of inspecting or ***and measures*** searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

General provisions relating to searches 7.8

Whether a search is made under a warrant issued under any of the Sections 93, 94, 95 and 97[72] or whether it is conducted without a warrant under any of the provisions of Sections 103, 165 and 166,[73] the provisions of Section 100 have been made applicable/[4] It has been reiterated by the Supreme Court that if the discovery of a fact is otherwise reliable its evidentiary value is not diminished by reason of non-compliance of Section 100(4} and 100(5).[75] Sections 100 and 165 have been held applicable to searches made under the Narcotic Drugs and Psychotropic Substances Act, 1985 also. Mere non-compliance of the provisions in the Code would not by itself vitiate the prosecution. But if the person searched is not informed of his right to demand that the search be made in the presence of a gazetted officer or a Magistrate as provided for under the Act, it

72. *See supra,* para. 7.4.

73. *See supra,* para. 7.7.

74. This is dear from the wordings of Ss. 100, 165(4} [sO]d 2.^3]. Also see, *Naga People's Moveme*

75. See, *Musheer Khan* v. *State of M.P.*. {2010} 2 SCC 748: (2010) 2 SCC (Cri) 1100: AIR 2010 SC 762.

Persons in charge of a closed place to allow search

may vitiate the proceedings.[76] The only case where these provisions have not been expressly made applicable is a search without warrant under Section 153 for false weights, measures, etc. It is, however, submitted that even in such a case the provisions of Section too would be made applicable to the extent it is practicable to do so. Section 100 is as given below:

roo. {1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by subsection (2) of Section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon *two* or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

{5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub-section {3}, a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of i860).

The section has three important aspects: *a)* the occupant of a place liable to search is required to give all reasonable facilities to the persons authorised to conduct a search; y the police and others authorised to search are armed with necessary powers for the proper and effective execution of the search;

76. ***State of Punjab*** v. ***Balbir Singh,*** (1994) 3 SCC 299: 1994 SCC (Cri) 634; ***Saiyad Mohd. Saiyad Umar Saiyad*** v. ***State of Gujarat,***

as possible of the search and to exclude the possibility of any concoction, or malpractice of any kind".[77]

An analysis of the section would bring out of the following points:

(i) The free ingress and reasonable facilities referred to in subsection (i) are to be made available both for a search under a warrant as well as for a search without a warrant.[78]

(ii) Sub-section (2) is also applicable in case of a search without warrant. If ingress to a place liable to search cannot be obtained as envisaged by sub-section (1), then sub-section (2), by importing Section 47(2) adopts the procedure whereby the police officer or other person conducting the search is empowered to enter the place and in order to effect an entrance into such a place to break open any outer or inner door or window of any house or place if after notification of his authority and purpose, and demand of admittance duly made, he could not otherwise obtain admittance. Section 47(2) provides a safeguard in favour of a *pardan- ashin* woman and the same would apply in case of a search also.[79] Further, it has been held that if in the exercise of the power or the performance of the official duty, improper or unlawful obstruction or resistance is encountered, there must be the right to use reasonable means to remove the obstruction or overcome the resistance. This accords with common sense and does not seem contrary to any principle of law.[80]

(Hi) In order to obviate the chance of any person stealthily taking away on his person any article or thing for which the search of a place is to be made, sub-section {3) provides for the search of such a person. The provision is necessary to prevent the object of the search getting frustrated. If the person to be searched is a woman, then, in order to protect her modesty it has been provided that the search shall be made by another woman with strict regard to decency.

(iv) The search is to be made in the presence of at least two independent and respectable inhabitants of the locality in which the place to be searched is situated. However, if no such inhabitant of the said locality is available or willing to be a witness to the search, the search can be made in the presence of the inhabitants of any other locality. What is more important to be emphasised is the respectability of the witness rather than his locality or independence.[81]

77. *Emperor* v. *Balai Gbose,* (1930) 31 Cri Lj 667, 669: AIR 1930 Cal 141, 143.

78. Searches under a warrant are contemplated by Ss. 93. 94, 95, 97 and searches without: warrant are contemplated by Ss. 103, 153,

79. For the text of S. 47(2,) *see,* para. 6.3.

SO. *Maiajog Dobey* v. *H.C. Bhari,* 1956 Cri Lj 140: AIR 1956 SC 44.

8L *Tut Mohan Ram* v. *State,* 1981 Cri LJ (NOCl 223 (Del).

The object of the provision is to guard against possible chicanery and unfair dealings on the part of the persons authorised to search and to ensure that anything incriminating which may be said to have been found in the premises searched, was really found there and was not introduced by the members of the search-party.[82] The presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles.[83] [84] [85] With a view to ensuring that the witnesses for the search are disinterested persons, the word "independent" has been inserted in sub-section (4).[84] [85] It suggests that the search-witness should be absolutely unprejudiced and disinterested in the result of the search.[S)] Witnesses who had been joining in the police raids and had been appearing as witnesses for the police for the last 15 years could not be considered as independent witnesses.[86] A witness should not be a party to any faction. Perhaps difficulties might be encountered in construing the term "independent" in relation to different individuals in a society in which people do have all kinds of labels religious, political, regional, etc. Absolute "independence" might rather be difficult to find, however, a reasonable degree of "independence" can legitimately be asked for and expected.

The word "respectable" does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way. He should have such standing as would make his words believable.[87] A dismissed constable, a thief, or a criminal of some kind, or a person perhaps of grossly immoral habits will not be considered as "respectable".[88] Being a prosecution witness will not, however, make a person less respectable. In practice the word "respectable"

82. *Abdullah* v. *Emperor,* (192.6) 27 Cri Lj 73;
83. *Malak Khan* v. *Emperor,* (1946) 47 Cri Lj 489, 492: AIR 1946 PC 16, 19. See also, *Ram Prasad* v. *Emperor,* (1938)
84. joint Committee Report, p. xi.
85. *Rajabather, re,* 1959 Cri Lj
86. *Hazara Singh* v. *State of*
87. *Rajabather, re,* 1959 Cri LJ
SS. *Asbfaq* v. *Emperor,* (1936) 37 Cri Lj rio8; *Inder Dutt* v.

has created difficulties. Persons who are ordinarily considered "respectable" do not normally wish to be search-witness, and this has led to the emergence of professional witnesses who are employed by the police to witness searches. It has been said that sub-section (4) does not mean that the investigating officer can have two or three persons accompanying them wherever they go for searches.[89] If despite the availability of respectable witnesses the police choose to have non-respectable witnesses there is an obvious inference that the police chose only such witnesses who would support them.[90]

(v) Sub-section (4) also provides that the officer or other person making the search is to call the abovesaid persons to attend and witness the search and that he may for this purpose issue a written order to them. If a person so ordered to be a witness neglects or refuses without reasonable cause to attend and witness a search, then according to sub-section (8) he shall be deemed to have committed an offence under Section 187 IPC.

(vi) The search-witnesses should actually accompany the police officers or other persons making the search and should be the actual witnesses to the fact of the finding of the property. It is not sufficient compliance with this section if the witnesses are merely summoned and kept present outside the building, while the search is being carried on within it, and then called on to see what has been found.[91]

Usually it is the unwritten rule that the persons of the search- witnesses and of the police party must be searched before they are allowed to enter the house so that the owner should not have reasonable grounds for suspecting that one of the search party had planted anything surreptitiously in his house. Failure to observe this rule would give to the defence a strong argument against the credibility of search evidence.[92]

Though there is nothing in law that prohibits searches being carried out during night, it has been held that, when not inconvenient, they should be conducted during daytime $0 as to avoid any complaint on the part of the accused that there was room for unfair practices like "planting" articles.[93] At the risk of some repetition it may again be emphasised that where lack of time is

89. *Public Prosecutor* v. *Pamarti Venkata Cbalamaiah,* 1957 Cri Lj 830: AIR 1957 AP 286, 288.

90. *A.P. Kutian Panickerv. State of Kerala,* (1963) 1 Cri Lj 669 (Ker); *State of Kerala* v. *Joseph,* (1963) 2 Cri LJ 454 (Ker); *K. Johnson,*

9L *Dinkar Nhanu Mangaonkar* v. *Emperor,* (1930) 31 Cri LJ 927, 928: AIR 1930 Bom 169.

92. *Emperor* v. *Mohd. Alt Khan,* (1933} 34 Cri Lj 641; *Sohan Lai* v. *Emperor,* (1933} 34 Cri Lj 568. *See* however contra, *Madiga Chinna*

93. *A.P. Kuttan Panicker* v. *State of Kerala,* (1963) 1 Cri *LJ 669,* 673 (Ker).

not a consideration, search without warrant is not proper and the recovery itself in that case would come under suspicion.[94]

(vii) Sub-section (6) requires that the occupant of the place of search, or his nominee, shall in every case be permitted to attend during the search. Denial of such permission may cause suspicion as to the reliability of the discoveries made out.[95] However, where the securing of the presence of the occupier or his nominee might cause such delay as to frustrate the purpose of the search, it may be permissible to dispense with his presence.[96] vy Sub-section (5} requires that a list of all things seized in the course of the search and of the places in which they are respectively found shall be prepared by the police officer or other person making the search and shall be signed by the witnesses. It is considered highly objectionable to make the accused sign or put his thumb-impression on the search-list.[97] Where the search memo was signed only by the policemen accompanying the Head Constable and not by any independent witnesses though they were present, it was held that the entire prosecution story appeared to be unnatural and doubtful.[98]

Similarly sub-section (7} requires that when any person is searched under sub-section (3) a list of all things taken possession of shall be prepared.

The section makes it obligatory that a copy of the list of things seized in a search shall be delivered to the occupant or his nominee in whose presence the search has been made. Similarly a copy of the list of things seized from a person on his search is required to be given to such person. This would ensure that the things seized are properly accounted for.

(fit) The recovery of the articles in a search can be proved at the trial by calling the police officer or other person making the search as a witness and it is not necessary to call a search-witness in court for this purpose. The court, however, can summon such search-witness if it considers necessary to do so.

In conducting searches in tribal areas where the provisions of the Code are not applicable, the underlying Principles of Criminal Procedure are **applied and things seized during search have to be handed over to the** police.[99]

94. *Ibid.*

95. *Ramesh Chandra Banerjee v. Emperor,* ILR

96. ***Koli Bhagu Ranchhod*** v. ***State,*** 1955

97. ***Narsiah, re,*** 1939 Cri

98. *Bhagwan Singh* v. *State*

99. See, *Naga People's*

Consequences of non-compliance with the provisions relating 7.9 to searches

(a) Magistrate not empowered to issue a search-warrant.—(/) A search- warrant for a search of place suspected to contain stolen property, forged documents etc. can only be issued by a District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class. [1][2] If, however, such a search- warrant is issued by any other Magistrate erroneously and in good faith, such a warrant shall not be the ineffective merely on the ground that the Magistrate was not empowered to issue the same. This has been specifically provided by Section 460.[2] *{it)* According to Section 93(3), only a District Magistrate or Chief judicial Magistrate can issue a warrant for a document, parcel or other thing in the custody of the postal or telegraph authority.[3] If any other Magistrate not so empowered issues such a warrant, then according to Section 461 the warrant shall have no effect.[4] *iiii)* Search-warrants for persons wrongfully confined can be issued under Section 97 by any District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class.[5] If any other Magistrate purports to issue a search-warrant under Section 97, the warrant, it is submitted, will be illegal and any entry into any place in consequence of such illegal warrant w'ould be without any legal authority.

(*.b) Search without warrant by police officers not authorised.*—It has been seen that under Sections 153, 165 and 166 a place can be searched without a warrant by a police officer of a certain rank or by one specially authorised according to the provisions of law.[6] A search conducted by any other police officer or other person would be illegal, and the entry into the house or place for such search would be unlawful. A search by a police officer outside the limits of his police station and in the circumstances in which he is not authorised to do so under Section 166(3), without legal authority and is illegal.

(c)Effect of contravention of the search-procedure.—Section 100 generally provides for the procedure to be followed in case of every search of a place.[7] Besides, Sections 165 and 166 provide for *additional* procedures to be follow-ed when the search is made by a police officer without warrant. The contravention of these provisions would make the search illegal or at least irregular.[8] Whether such contravention would vitiate the trial

15198 SCC (Cri) 514.

1. *See supra,* S. 94, para. 7.4(d)-
2. *See,* d. *la] of* S. 460; S. *460* deals with irregularities which do not vitiate proceedings.
3. For the text of S. 95(3), *see supra,* para. 7.4.
4. *See,* cl. *[b)* of S. 461; s. 461 deals with irregularities which vitiate proceedings.
5. For the text of S. 97, *see supra,* par a. 7.4.
6. For the text of Ss. 155, 165, *166, see supra,* para. 7.7.
7. For the text of S. 100, *see supra,* para. 7.8.
8. *Sbarda Singh v. State of U.P.,* **1999 Cri LJ 1880 (All).** *See also* **discussions in** *Musheer Khan*

or its effect would depend upon the question of prejudice caused to the accused person.[9] Here it is worthwhile to take note of Section 465 which is as follows:

Finding or sentence when reversible by reason of error, omission or irregularity

> 465. (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.
>
> (2.} In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

It has been observed that non-compliance with the provisions of Sections 100 and 165 of the Code will not vitiate the trial or make evidence of the search officer inadmissible in evidence.[10] The provisions are sometimes considered to be directory only.[11] The Supreme Court in *Shy am Lai Sharma* v. *State* ofM.P.[12], reviewed its earlier decisions and observed that "this Court has not finally decided whether a search already made in contravention of the provisions of Section 165 CrPC, makes it illegal or void or merely provides a justification for an obstruction to the search when it is intended or in the process of its being conducted". On the findings of the case in hand the Supreme Court considered it unnecessary to resolve this doubt and the question still remains open today.

In any case, the non-compliance with the provisions of Sections 100 and *16$* would affect the weight of evidence in support of the search and recovery [13] The court in such a case may be circumspect to closely

v. *State of M.P.,* {201c) 2 SCC 748: (2010) 2 SCC (Cri) 1100: AIR 2010 SC 762. Certain facts may be admissible if they are reliable.

9. *Radha Kishan* v. *State ofU.P.,* (1963) 1 Cri LJ 809: AIR 1963 SC 822; *Kochan Velayudhan* v. *State of Kerala,* AIR 1961 Ker 8 (FB); *Got/indan Nair, re,* 1959 Cri Lj 1445: AIR 1939 Mad 544; *Pyli Yaccob* v. *State,* (1953} 54 Cri LJ 1670: AIR 1953 TC 466.

10. *A.P. Kuttan Panicker* v. *State of Kerala,* (1965} 1 Cri Lj *669,674* (Ker); *State v. Satyanarayan Mallik,* AIR 1965 Ori 136, 138; *Ujagar Singh* v. *Emperor,* (1932) 33 Cri LJ 492: AIR 1932 Oudh 249; *Mamchand &* Co. v, *CIT,* AIR 1969 Cal 431; *Bahvant Singh* v. *R.D. Shah,* AIR 1969 Dei 91; *State* v. *Kuppuswamy Murgesh,* AIR 1967 Bom 199; *Shyam Lai v. King Emperor,* (1927) 28 Cri LJ 652: AIR 1927 All 316; *Panda Inderjit* v. *Emperor,* (1947) 48 Cri LJ 61T: AIR 1947 All 165; *Sunder Singh* v. *State ofU.P.,* 1936 Cri LJ 801: AIR 1956 SC 411; *Govindan Nair, re,* 1959 Cri LJ 1445: AIR 1959 Mad 344; *K. Johnson, re,* 1957 Cri Lj 1210: AIR 1957 AP S29; *Suseela* v, *State,* 1982 Cri LJ 702 (Mad).

lL *Eedders Lloyd Corpn.* v. *B.A.L. Swarni,* AIR 1969 Del 26; *Ujagar Singh* v. *Emperor,* (1932) 33 Cri Lj 492: AIR 1932 Oudh 249.

12. (1972) 1 SCC 764: 1972 SCC (Cri) 470: 1972 CriLJ 63813. *Sunder Singh* v. *State ofU.P.,* 1956 Cri Lj 801: AIR 1956 SC 411; *A.P. Kuttan Panicker v. State of Kerala,* {1963} r Cri Lj 669, 674 (Ker); *State of Bihar* v. *Kapil Singh,* 1969 Cri LJ

scrutinise the evidence of seizure; [14] and may refuse to act upon the solitary evidence of the police officer. *Secondly*, if the search-procedure is not strictly legal, as for instance when the police officer has failed to comply with the provisions of sub-sections (i) and (5) of Section 165, the occupant of the place of search can obstruct with impunity the police officer attempting to search the place.[15] *Thirdly*, as the non-compliance with the search-procedure would make the entry into the house as one without lawful authority, the police officer or the other person making the search could be liable to pay damages for trespass in a suit in civil court.[16]

In *State of Maharashtra* v. *Natwarlal Damodardas* Som[17], the Supreme Court has quoted with approval the following observations made in its earlier decision in *Radha Kish an* v. *State of* U.P.[18]:

> So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of Sections 103 [S. 100 of the new Code] and 165 of the Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues.

{d) Search with consent of the occupant.—If the entry into the place of search and the subsequent search are with the consent of the occupant, the search and recovery will not be affected on the ground that the search procedure in Sections too and 165 was not followed. Where it is alleged and proved that the articles were produced by the accused person himself, Section 165 does not apply.[19]

2.79: AIR 1969 SC 53; *Malak Khan* v. *Emperor,* (1946} 47 Cri LJ 489, 492: AIR 1946 PC 16, 19; *Khalil* v. *State.* 197 6 Cri L] 465 (All). *See also* observations in *State of Punjab* v. *Balbir Singh,* (1994} 3 SCO 299: 1994 SCC (Cri) 634; *Saiyad Mohd. Saiyad Umar Saiyad* v. *State of Gujarat,* (1995) 3 SCC 610: 1995 SCC

14. *State* v. *Satyanarayan Mallik.* AIR 1965 O ri 136 : *Radha Kishan* 4. *State of U.P., {1963) 1* Cri LJ 809: AIR 1963 SC 822, 824.
15. *Tbakur 7anit* v. *State,* AIR *1964* Pat 493; *State* v. *Satyanarayan Mallik,* AIR 1965 Ori 136; *Radha Kishan* v. *State of* 17.P., {1963) 1 Cri LJ So9: AIR 1963 SC S22, 824; *Gopi Mahto* v. *Emperor,* {1932} 33 Cri Lj 233, 235: AIR 1932 Pat 66; *Cbander Prasad* v. *Emperor,* {1937} 38 Cri LJ 982: AIR 1957 Pat 501; *Madbo Sonar* v. *Emperor,* {1915) 16 Cri LJ 589; *Mir Shah Nawaz Khan* v. *Emperor,* (1915) 16
16. *Hira Lai* v. *Ramdulare,* AIR 1935 Nag 237; *Bahabal Shah* v . *Tarak Nath,* ILR (1897) 24 Cal 691.
17. (1980) 4 SCC 669: 1981 SCC (Cri) 98, 102: 1980 Cri Lj 429. See also, *Abdul Sattar* v. *State,* 1989 Cri LJ 430 (Bom).
18. (1963) 1 Cri Lj 809: AIR 1963 SC 822. 824. See also, *State ofT.N. v. Kandasamy Piilai,* 1977 Cri Lj 1690 (Mad).
19. *Malak Khan* v. *Emperor,* (1946) 47 Cri Lj 489, 492: AIR 1946 PC 16, 19.

7.10 Seizure

Where a search-warrant is issued for the search of any particular things, the police officer or other person making the search has been empowered to seize such things if recovered during such search. Similarly where a police officer during the investigation of any offence searches a place for any particular things, he has the power to seize such things if recovered in the search. This has been provided either expressly or impliedly in Sections 93 (read with Form 10), 94 (read with Form n), 95, 100(5) [am]h (7} which have been already considered.[20] [21]

However, the police officer making any search has far wider powers to seize any incriminating things other than those specified things for which the search is made. Such powers are necessary for the effective discharge of police functions and have been provided by Section 102 which is as follows:

102. (1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

[21] [(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court [22] [23][or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation], he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:]

Power of police officer to seize certain property

[23][Provided that the property seized under sub-section {1} is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.]

The provision is particularly useful where the search is under a warrant for a general search. The section has a wide sweep and is not restricted to recoveries during the search alone, nor is it confined only to cases in respect of cognizable offences. The words “any offence” show unmistakably that even though there may be the commission of a non-cognizable offence, a police officer may seize any property found

20. For me text of these sections, see, paras. 7.4
21. *bis.* by Code of Criminal Procedure
22. *Ins.* by Act 2.5 of 2005, S. 15(a) {w.e.f.
23. *Ins,* by Act 25 of 2005, S. 13(h) (w.e.f.

under suspicious circumstances.[24] It has had occasion to examine the power under Section 102 in M.T. *Enrica Lexie* v. *Doramma*[25]. The court identified the property liable to seizure under Section 102 as *i)* stolen or suspected to be stolen property, *ii)* property which has direct link with commission of crime. The object of the crime should also be considered. Police can seize such property recovered under Section 102(1) and no other. The new sub-section (3) requires a police officer to report to the Magistrate seizure of the property and in case the property cannot be carried to the court, to give it to a person executing bond for its production before the court. As a non-cognizable offence cannot be investigated by a police officer without an order of a Magistrate and as the police officer is not required to approach and inform a Magistrate on the seizure of property in respect of the commission of a non-cognizable offence, it is rather difficult to understand the significance of the power of seizure of property in respect of a non-cognizable offence. Therefore, the wide power given to a police officer to seize property under this section should be availed only in those cases where he has power to investigate into offences conferred by the Code or by other law's.[26] [27] [28] The word "seize" has to be construed to mean taking physical possession as in case of taking actual possession of movable property. It has been held that prohibiting a bank with which the accused has an account and a locker, not to pay any amount out of the account of the accused to the accused and not to allow the accused to take away property from the locker, is not seizure under Section 102.[27] [28] Nor has the police any authority under Section 102 to order stoppage of operation of the bank account of the accused.[2S]

This question whether in exercise of powers under Section 102 a police officer could order stoppage of operation of accounts of an accused came to be answered in the affirmative by the Supreme Court albeit contrary- decisions by the High Courts of Karnataka, Allahabad, Gauhati and Delhi.[29] The reasons for this ruling could be gleaned from the court's observations which run thus:

> [I]f there can be no order of the seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the courts would be powerless to get the said money which has any direct link with the commission of the offences committed by the accused as a public officer. We are, therefore, persuaded to take the view that the bank

24. *Baba! a! Agar walla* v. *Province of Orissa,* (1954) 55 Cri LJ 162.5: AIR 1954 Ori 2.25.
25. (2012} *6* SCC 760: (2012) 3 SCC {Cri} 309: 2012 Cri Lj 2845.
26. *Nemicband Jain* v. *Supt. of Central Excise and Customs,* (1963} 2 Cri LJ 288: AIR 1963 Maui 35.
27. *Purbancbal Road Service* v. *State,* 1991 Cri Lj 2798 {Gau).
28. *Main ad Construction Co.* v. *State of Karnataka,* 1994 Cri LJ 645 (Kant).
29. *State of Maharashtra* v. *Tapas D. Neogv,* {1999} 7 SCC 685: 1999 SCC (Cri) 1352: 1999 Cri LJ4305.

account of the accused or any of his relation is 'property' within the meaning of Section 102, of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of offence for which the police officer is investigating into.[30]

The Madras High Court has ruled that in case of seizure of a bank account the police officer should do two things. *Firstly,* he should inform the Magistrate concerned forthwith regarding the prohibitory orders. He should also give notice of the seizure to the accused and allow him to operate the bank account subject to his executing a bond undertaking to provide the accounts in court as and when required to hold them subject to such orders as the court may make regarding the disposal. According to the High Court an order under Section 102 without doing so is liable to be set aside.[30] [31]

With a view to avoiding loss due to decay of property a proviso is added to Section 102(3) [ro] the effect that if the property is subject to decay and of value of less than rupees five hundred, Superintendent of Police can order auction of such property. The proceeds could be disposed of under Sections 457 and 458.

7.11

Power to impound

7.12 It may be pertinent to notice that according to Section 104 "any court may, if it thinks fit, impound any document or thing produced before it under this Code".

Disposal of things ***found in search beyond jurisdiction***

Disposal of things found in search beyond jurisdiction

In this connection provision has been made by Section 101 which reads as follows:

101. When, in the execution of the search warrant at any place beyond the local jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and, unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.

30. ***Ibid,*** 4311.
31. *B. Ranganathan* v. *State,*

Pre-trial Procedure: Investigation by

Object and scope of the chapter

{a) Meaning and stages of investigation.—According to clause *{b)* of Section 2, "investigation" includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate.[1] The Supreme Court has viewed the investigation of an offence as generally consisting of:

1. proceeding to the spot;
2. ascertainment of the facts and circumstances of the case;
3. discovery and arrest of the suspected offender;
4. collection of evidence relating to the commission of the offence which may consist of:
   - *(a)* the examination of various persons (including the accused) and the reduction of their statements into writing, if the officers think fit,
   - *(b)* the search of places or seizure of things considered necessary for the investigation or to be produced at the trial; and
5. formation of the opinion as to whether on the materials collected there is a case to place the accused before a Magistrate for trial, and if so, taking the necessary steps for the same by the filing of a charge-sheet under Section 173.[2]

1. *See supra,* para. 7.4 for the text of d. *b),* S. z.

2. *H.*

Two important steps in the process of investigation, *viz.* discovery and arrest of the suspected offender, and the search of places and seizure of things considered necessary for the investigation, inquiry, or trial, have been already discussed in detail in the preceding chapters.[3] This chapter is intended to deal with the remaining aspects of investigation.

(b) Powers of police to investigate.—The principal agency for carrying out the investigations of offences is the police; and to make this agency an effective and efficient instrument for criminal investigations, wide powers have been given to the police officers. Apart from the duty of the public to give information to the police in respect of certain serious offences,[4] an investigating police officer can require the attendance of persons acquainted with the facts and circumstances of the case under investigation. [S. 160] The police, however, cannot evolve its own mechanism of inflicting punishment by summoning unnecessarily and in case of non-compliance to initiate proceedings under Section x88, Penal Code, i860 (IPC) as the order under Section 160 is not an order promulgated by a public servant.[5] He can examine witnesses and record their statements. [S. 161] His discretion to record or not to record the statement under Section 161 is unfettered.[6] His powers of arrest, search and seizure have been already discussed in Chapters 5, 6 and 7. All these powers are subject to reasonable restrictions and controls. The Code prescribes procedures for the recording of statements and confessions made during investigations, and specifies the use to which these may be put at the time of trial. The present chapter considers these procedures and examines the evidentiary value of the statements and confessions recorded during the course of the investigations.

The distinction between cognizable and non-cognizable offences also demarcates the powers of the police in respect of criminal investigations. While the police officers have the power and also the duty to investigate into all cognizable offences, they are enjoined not to investigate the non-cognizable offences without the order of a competent Magistrate.[7] However, if the complaint discloses both cognizable and non-cognizable offences the police may investigate the case as they investigate into cognizable offences.[8] It may also be noted that the power to investigate is not

State v. Jai Bbagwan, 1985 Cri Lj 932 (Del); *Bijal Rev ash anker joshi* v. *State of Gujarat*, 1997 Cri LJ 4170 (Guj); see also, P.V. *Vijayaraghavan* v. *CBl*, 1984 Cri Lj 1277 (Ker), wherein ir has also been ruled char investigation would be complete only when all cognizable offences in a case had been investigated.

3. *See supra*, Chaps. 5, 6 and 7.
4. *See supra*, Ss. 39 and 40, para. 4.6 and 4.7.
5. *T. Pursbotbam* v. *Circle Inspector of Police*, 1997 Cri Lj 4011 (AP).
6. *Bhaktu Gorain* v. *State*, 2010 Cri Lj 4524 (Cal).
7. *See infra*, S. 155(2), para. 8.4. *See also*, the observations in para. 4.3, *supra*.
8. *See*, S. 155. Also see, *State of Orissa* v. *Sharat Chandra Sahu*, (1996} 6 SCC 455: 1996 SCC (Cri) 1387: AIR 1997 SC 1.

conferred on every police officer. Only an officer in charge of a police station (or any other officer of a higher rank}[9] [10] [11] has been empowered by the Code to investigate. [S. 156]

An offence might be committed within the local limits of one police station, or it might have been committed partly in the local limits of one police station and partly within the local limits of another police station, or an offence might be committed on journey or voyage, and then questions may arise as to which police station is to undertake the investigation into such an offence. For resolving such questions, Section 156(1) imports the general principles as laid down in Sections 177 to 189 (Chapter XIII of the Code) for determining which shall be the proper court to inquire or try an offence.[10] The question whether the police officer of a station has power to investigate into a crime committed outside his local jurisdiction has been answered in the affirmative by the Supreme Court in *Satvinder Kaur* v. *State (Govt. ofNCT of Delhi)*[11]. In this case the original complaint w[r]as filed by the petitioner in the police station at Patiala. Later another complaint was filed in a police station in Delhi. The Supreme Court ruled that the Delhi police has, in view of Sections 177 and 178, Criminal Procedure Code, 1973 (CrPC), power to conduct the investigation. Sections 177 to 189 will be discussed in the next chapter *i.e.* Chapter 9.

{c) Authority given to a private citizen to investigate.—Any person aggrieved by the commission of any cognizable offence need not necessarily go to the police for redress. He can, as will be seen later, directly approach a Magistrate with a complaint. The Magistrate may thereupon take cognizance of the offence and may proceed to take steps for the trial of the accused person. This alternative procedure is useful, particularly when the police officers, for one reason or the other are indifferent or likely to be indifferent towards the investigations, or are colluding with or shielding the offender. In such a situation the Magistrate taking cognizance has power to direct an investigation to be made by a person other than a police officer; [S. 202(1)] and such person shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant. [S. 202(3)]

(d) Object to make investigations speedy and just.—Sections 154 to 176 contained in Chapter XII of the Code deal with "information to the police and their powers to investigate". These sections have made very elaborate provisions for securing that an investigation does take place into a reported offence and the investigation is carried out within the limits of the law without causing any harassment to the accused and is also

9. *See supra,* S. 36, para. 3.4.
10. *Lilade Sitade Pauaiya* v. *State of Gujarat,* 1983 Cri LJ 934, 938 (Guj).
11. (1999) 8 SCC 728: 1999 SCC (Cri) 1503.

completed without unnecessary or undue delay.[12] Relying on the maxim, *contra veritatem lex numquam aliquid permittit,* the Supreme Court held that it is the duty of the court to accept and accord its approval only to a report which is the result of faithful and fruitful investigation. It is the right of the accused to have fair investigation.[13] Regarding the avoidance of delay, Section 173(1) expressly provides that every investigation under this chapter (Chapter XII of the Code) shall be completed without unnecessary delay.

(e) Relationship between the police and judiciary.—It would be pertinent to note here the relationship of the police with the judiciary during the investigation process. As observed by the Law Commission, a Magistrate is kept in the picture at all the stages of the police investigation, but he is not authorised to interfere with the actual investigation or to direct the police as to how that investigation is to be conducted.[14] In *King Emperor* v. *Khwaja Nazir Ahmad*[15], the Privy Council has observed, "The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with due observance of law and order is only to be obtained by leaving each to exercise its own function ... ." This view has also been approved and shared by the Supreme Court.[16] The legal position appears to be that if once an offence is disclosed, an investigation into the offence must necessarily follow in the interests of justice and the court will not normally interfere with the investigation into the case and will permit investigation into the offence alleged to be completed.[17] If, however, the materials do not disclose an offence, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed will result in unnecessary harassment to a party whose liberty and property may be put in jeopardy for nothing. In such a case the High Court in the exercise of its powers under Article *zz6* of the Constitution (or under S. 482 of the Code) may stop and quash the investigation proceedings.[18]

12. *Abhinandan Jba* v.
13. See, *Kashmeri Devi* v. *Delhi Admn,,* 1988 Supp SCC 482:
14. 41st Report, Vol. 1, p. 167
15. (1945) 46 Cri LJ 413:
16. *State ofW.B.* v. *S.N. Basak,* (1963) 1 Cri LJ 341: AIR 1963 SC
17. *See,* discus sions in *State of Bihar*
18. *State ofW.B.* v,

Information to the police as to cognizable cases 8.2

Any person can give information to the police relating to the commission of a cognizable offence, and Section 154 of the Code provides for the manner in which such information is to be recorded. An analysis of Section 154 brings out the following points:

1. The information is to be given to an officer in charge of a police station having jurisdiction for investigating the case. [S. 154(1)]
2. If the information is given orally to such officer, it shall be reduced to writing by the officer himself or under his direction. [S. 154(1)]
3. The information, if given in writing, or if reduced to writing as aforesaid, shall be signed by the informant. [S. 154(1}]
4. The information as taken down in writing shall be read over to the informant. [S. 154(1}]
5. The substance of the information is then to be entered by the police officer in a book kept by him in the prescribed form. [S. 154(1}] This book is called Station Diary or General Diary (see, S. 44, Police Act, 1861).
6. The informant then shall forthwith be given a copy of the information as recorded in the aforesaid manner. [S. 154(2.)]

The statement of the informant as recorded under Section 154 is usually mentioned in practice as the first information report or popularly called as FIR. The principal object of the FIR from the point of view of the informant is to set the criminal law in motion.[19] And the police cannot refuse to register the complaint. Nor can this power be usurped by the Magistrate.[20] This object wall be defeated if the police officer in charge of the police station refuses to record the information as required by the abovestated provisions of Section 154(1). Therefore sub-section (3) of Section 154 provides a remedy in such a situation. According to Section 154(3), if any person is aggrieved by a refusal on the part of the police officer in charge of a police station to record the information, he may send by post the substance of such information in writing to the Superintendent of Police concerned. If the Superintendent is satisfied that the information discloses the commission of a cognizable offence, he *shall* either investigate the case himself or direct an investigation to be made by a subordinate police officer in the manner provided by the Code. Sub-section (3) of Section 154 further provides that such subordinate police officer investigating the offence shall have all the powers of an officer in charge of police station in relation to that offence.

1 SCO 692.: 1988 SCC (Cri) 2.54: 1988 Cri LJ 853. See also, *Shiva Nath Prasad* v. *State of W.B.,* (2006) 2 SCC 757: 2006 Cri LJ 1258,

19. *Sk. Hasib* v. *State of Bihar,* (1972) 4 SCC 773: 1972 Cri LJ 233, 236: AIR 1972 SC 283.
20. *Ganesh Dass* v. *State of Kerala,* 1996 Cri LJ 612 (P&H); *Palwinder Singh* v. *State of Punjab,* 1997 Cri LJ 2811 (P&H).

8.2.1 *Registration of FIR*

The question whether it is obligatory for the police to register FIR on information given by an informant has been answered in the affirmative by the five-member Bench in *Lalita Kumari* v. *Govt. of U.P.*[11] It has been categorically ruled that the provisions of Section 154(1) CrPC is mandatory and the officer concerned is duty bound to register the case on the basis of information disclosing commission of cognizable offence. In other words, it is a mandatory provision. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and the police may conduct a preliminary verification for the limited purpose of ascertaining as to whether a cognizable offence has been committed. The court has mentioned some such areas as matrimonial family disputes, medical negligence cases, etc., etc.

The object sought to be achieved by registering information received in relation to the commission of a cognizable offence is that there cannot be any embellishment etc. later. The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also ensure judicial oversight.

The obligation to register FIR has several advantages ***viz.*** it is the first step to "access to justice" for a victim, it upholds the rule of law, it facilitates swift investigation, it avoids manipulation in criminal cases in several ways.

It is worthwhile to emphasise here that an information to have the status of FIR under Section 154 must be an information relating to the commission of a cognizable offence and it must not be vague but definite enough to enable the police to start investigation.[21] [22] It has also been clarified by the Supreme Court that since the word "information" in Section 154 is not qualified as "reasonable" it is the duty of the police to register the information under Section 154.[21] * [23] [24] [25] The Punjab and Haryana rules prescribe that the police "is bound to formally register a case and then investigate into the crime".[24] [25] It has been observed by the Supreme Court that "if the allegations made in the FIR are taken at their face value and accepted in their entirety do not constitute an offence; the criminal proceedings instituted on the basis of such FIR should be quashed".[23] Where an anonymous

21. (2014) 2 SCC 1.
22. *State of Assam* v. *U.N. Rajkhowa,* 1975 Cri Lj 354, 377 (Gau); see also, *Mani Mohan Ghose v. Emperor,* (1932.) 33 Cri LJ 138: ILR 58 Ca! 1312: AIR 1931 Cal 745, 748: 35 CWN 623;
23. *State of Haryana* v. *Bhajan Lai,* 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426: 1992 Cri LJ 527; see also, *Palwinder Singh* v. *State of Punjab,* 1997 Cri Lj 2S11 (P&H); *Madhu Bala*
24. See, *Ramesh Kumari v.State* pVCT *of Delhi),*
25. *State ofU.P.* v. R.K. *Srivastava,* (1989) 4 SCC 59:

telephonic message did not disclose the names of the accused nor did it disclose the commission of a cognizable offence, it was held that such a telephonic message could not be held as FIR.[26]

It has, however, been observed by the Rajasthan High Court[27] that

if the telephonic message has been given to officer in charge of a police station, the person giving the message is an ascertained one or is capable of being ascertained the information has been reduced into writing as required under Section 154 CrPC and it is a faithful record of such information and the information discloses commission of a cognizable offence and is not cryptic one or incomplete in essential details, it would constitute FIR.

In *Soma Bhai* v. *State of Gujarat*[28], the complainant had made the report regarding the occurrence having taken place to PSI Patel, who, however, before reducing it into writing, by way of abundant caution, tried to seek further instructions from the main police station at Surat and booked a call to Surat. The message given to the Surat police station was too cryptic to constitute first information report within the meaning of Section 154 of the Code and was meant to be only for the purpose of getting further instructions. It was, therefore, held that the facts narrated to PSI Patel which were reduced into writing a few minutes later undoubtedly constituted the first information report in point of time made to the police in which necessary facts were given.

Sometimes it may happen that more than one person go at or about the same time and make statements to the police about the same cognizable offence. In such a situation the police officer will use common sense and record one of the statements as FIR.[29] Case law on this question seems to show the trend of courts' acceptance of FIR as statements which give circumstances of the crime with a view that a police officer might proceed to investigate.[30] However, if oral information relating to the commission of a cognizable offence is given to the police officer in charge of a police station, but the same is not recorded and the police officer proceeds to the scene of the offence and there records statements of witnesses, none of such statements would amount to FIR. Because in such a case the real FIR was the unrecorded oral information given to the police by the informant.[31] However in a case wherein though the police officer went to the scene hearing rumours but recorded a statement at the police station, it

26. ***Tapinder Singh*** v. ***State,*** (i970) 2 SCC 113: 1970 SCC (Cri) 328; see
27. ***Tebal Singh*** v. ***State of Rajasthan,*** 1989 Cri Lj 1350 (Raj); aiso see, ***Dasan*** v. ***State of Kerala,*** 1987 Cri LJ 180 (Ker).
28. {1975} 4 SCC 257: AIR 1975 [sc T]453-
29. ***Marti Mohan Ghose*** v. ***Emperor,*** (1932) 33 Cri LJ 138: ILR 58 Cal
30. ***See,*** observations in ***Jagdtsb v. State of M.P.,*** 1992 Cri LJ 981 (MP); ***Ram Singh*** v. ***State of Punjab,*** 1992 Cri LJ 805 (P&Hl.
31. ***Lachhman*** v. ***State,*** 1973 Cri LJ 1658 (HP),

was held that in the circumstances of the case that statement could be accepted as FIR.[32] A statement recorded by the police in respect of a cognizable offence can be considered and used as FIR, if the same is recorded before the commencement of the investigation, but not otherwise. Simply because the statement was the first one recorded by the police in point of time, would not make it FIR if such a statement was recorded after the commencement of the investigation.[33 34 35 36]

As will be seen later, the evidentiary value of FIR is far greater than that of any other statement recorded by the police during the course of the investigation. Therefore the question, whether a statement is FIR or is one made after the FIR assumes importance. Considering the relative importance of FIR, the Code contains adequate safeguards to ensure its accuracy. Thus Section 154 requires the FIR to be recorded verbatim in the very language of the informant {as far as possible), to be read over and explained to him, and to be signed by the informant. The idea behind reading over the information reduced into writing and obtaining signatures of the first informant thereon are intended to ensure that what has been reduced into writing is a true and faithful version of the information given to the officer in charge of the police station.[34 35 36] The section also makes it obligatory that a copy of the FIR is given to the informant. While interpreting Section 154(2,), the Supreme Court in *State* v. *N.S.* Gnaneswarancategorically held that non-supply of copy of FIR under Section 154(a) CrPC may not vitiate the trial in every case. The court also pointed out that procedure followed by CBI in not directly registering FIR on receipt of information is proper inasmuch as the CBI in such cases has to conduct a preliminary inquiry after registering the information in the Register concerned.: Here the accused is not at all prejudiced in the procedure followed by CBI In cases involving economic offences as exempted in the decision in *Lalita Kumari* v. *Govt, of U.PP*[6]

In this connection it may be pertinent to mention that the accused in a corruption case initiated by an informant by way of a written complaint to Anti-Corruption Bureau is not entitled to get a copy of the complaint which gave rise to preliminary inquiry and registration of FIR. This is so with a view to protect the informant. In fact his complaint does not become the foundation of the FIR. Section 157 further requires the investigating officer to send the FIR at once to the Magistrate taking cognizance on police report. Hence, though subsequent interpolations In the

32. *Pattad Amarappa* v. *State of*
33. *Somappa Vamanappa Madar* v.
34. *Tehal Singh* v.
35. {2013) 3 SCC 594: (2013) 3
36. (2014) 2 SCC 1.

FIR are not unknown, nevertheless the aforesaid provisions to a large extent ensure the accuracy of the FIR.[37]

8.3 Evidentiary value of FIR

A FIR means the information, by whomsoever given, to the officer in charge of a police station in relation to the commission of a cognizable offence and which is first in point of time and on the strength of which the investigation into that offence is commenced.[38]

It is settled law that a FIR is not substantive evidence, that is to say, it is not evidence of the facts which it mentions.[39] However, its importance as conveying the earliest information regarding the occurrence cannot be doubted.[40]

Though the FIR is not substantive evidence, it can be used to corroborate the informant under Section 157, Evidence Act, 1872, or to contradict him under Section 145 of the Act, *if the informant is called as a witness at the time of trial.*[41] It may however, become relevant under Section 8, Evidence Act.[42] Section 157, Evidence Act is as follows:

> 157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact

The FIR should be lodged with the police at the earliest opportunity after the occurrence of a cognizable offence. The object of insisting upon prompt lodging of the report to the police is to obtain early information regarding the circumstances in which the crime was committed. Delay in lodging the FIR quite often results in embellishment which is a creature of afterthought and on account of delay, the report not only gets bereft of the advantage of spontaneity, but danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation and for these reasons, it is essential that delay in lodging the FIR should satisfactorily be explained.[43] The FIR will

37. *See,* 41st Report, Vol. 1, *Note of dissent,* p. 376, para. 12.
38. *State of Bombay* v. *Rusy Mistry,* 1960 Cri LJ 532: AIR 1960 SC 391; *Gurusami Naidu* v. *Guruswami Naidu,* (1951) 52. Cri Lj 857: AIR
39. *State of Assam* v. *U.N. Rajkhou/a,* 1975 Cri LJ 554, 378 (Gau); *Damodarprasad Cbandrikaprasad* v. *State of Maharashtra,* {1972} 1 SCC 107: 1972 SCC (Cri) 110, 114: 1972 Cri lJ 451, 453-54; *Pritam Singh* v. *State of Punjab,* 1977 Cri Lj 51 (P&H); see also,
40. *Sk. Hasib* v. *State of Bihar,* (1972) 4 SCC 773: 1972 Cri LJ 233, 236: AIR 1972 SC 283.
41. *Agbnoo Nages;a* v. *State of Bihar,* 1966 Cri Lj 100, 103: AIR 1966 SC 119; *Sk. Hasib* v. *State*
42. *Bherti Singh* v. *State ofRajasthan,* (1994) 2 SCC! 467: 1994 SCC (Cri) 555.
43. *Bishnu Deo* v. *State.* 1982 Cri *Lj* 493, 495 (Ori); see also,

have better corroborative value if it is recorded before there is time and opportunity to embeilish or before the informant's memory fails. Undue or unreasonable delay in lodging the FIR therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation and consider its effect on the trustworthiness or otherwise of the prosecution version.[44] In a rape case, where the FIR was lodged 10 days after the incident, it was explained that as the honour of the family of the prosecutrix was involved the members of the family had taken that time to decide whether to take the matter to the court or not. This explanation for the delay was held to be reasonable under the circumstances.[45] Similarly, in a case where the relatives of the injured person were anxious to provide immediate medical aid to him, the delay in their lodging the FIR was considered as well explained.[46] The fact that the FIR does not contain the names of the accused or of the eyewitnesses is normally an important circumstance, but the omission loses its significance if the FIR is from a person other than an eyewitness.[47] Though generally speaking the contents of FIR can be used only to contradict or corroborate the maker thereof, there may be cases where the contents become relevant and can be put to some other use also. Omissions of important facts affecting the probabilities of the case, are relevant under Section n, Evidence Act in judging the veracity of the prosecution case.[48] When the FIR contains an omission as to an important fact relied upon by the prosecution, the omission is important, and the court may refuse to consider

44. *Apren Joseph v. State of Kerala,* (1975) 5 SCC 114: 1973 SCC (Cri)

45. *Ha^al Singh* v. *State ofH.P.,*

46. *Ram Chandr a* v. *State of Rajasth*

47. *Pandurang* v. *State of Hyderabad,* 1955 Cri LJ 572: AI

48. *Ram. Kuma2 Pandey v. State*

the evidence of the informant on that fact.[49 50 51] Non-disclosure in the FIR of the names of the assailants whom the informant knew from before, made his testimony in court wherein he named them, unworthy of credence,[50 51] The FIR can also be used for the cross-examination of the informant and for contradicting him. This is possible by relying on Section 145, Evidence Act which is as follows:

> [51]145. A witness may be cross-examined as to previous statements made by him in writing or reduced in writing, and relevant to matters in question, with- out such writing being shown to him, or being proved; but, it it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Cross-examination as to previous statements in writing

Considering Sections 157 and 145, Evidence Act it is quite obvious that the FIR cannot be used for the purpose of corroborating or contradicting any wdtness other than the one lodging the FIR.[52]

If the FIR is given to the police by the accused himself, it cannot possibly be used either for corroboration or contradiction. The accused cannot be the prosecution witness, and he would very rarely offer himself to be a defence witness under Section 315 of the Code. Moreover if the FIR is of a confessional nature it cannot be proved against the accused- informant as it would be hit by Section 25, Evidence Act.[53] That section provides that "no confession made to a police officer shall be proved as against a person accused of any offence". If the FIR given by the accused is non-confessional, it may be admissible in evidence against the accused as an admission under Section 21, Evidence Act or as showing his conduct under Section 8, Evidence Act.[54]

In certain cases the FIR can be used under Section 32(1), Evidence Act or under Section 8, Evidence Act as to the cause of the informant's death or as a part of the informant's conduct.[55]

Role of police as to non-cognizable cases 8.4

Generally speaking, non-cognizable offences are more or less considered as private criminal wrongs. Therefore the investigation into such

49. *Ramjanam Singh* v. *State of Bihar,* 1956 Cri Lj 1254: AIR 1956 SC 643.
50. *Bhagwan Dass* v. *State,* 1980 Cri LJ 1033 (Del).
51. As to the application of S, 145 to police-diaries, *see,* the Code of Criminal Procedure, 1973 {2. of 1974), S. 172.
52. Sfc. *Hasib* v. *Slate of Bihar,* (1972) 4 SCC 773: T972 Cri Lj 233, 236: AIR 1972 SC 283.
53. *Nisar Ah* v. *State of* LLP., 1957 Cri Lj 550: AIR 1957 SC 366; *Aghnoo Nagesia v. State of Bihar, 1966* Cri Lj too. 103: AIR 1966
54. *Asghcn10190. Nagesia* v. *State of Bihar,* 1966 Cri Lj 100, 103: AIR 1966 SC 119: V. *fhomas* v. *State of Kerala,* T974 Cri LJ 849, 854 (Ker); *Faddi* v. *State ofM.P.,* {196 4) 2 Cri LJ 744: AIR 1964 SC 1850;
55. *Daraoaarprasad Cbandrikaprasad* v. State *of Maharashtra,* (1972} *r* SCC 107: 1972 SCC {Cri} no: 1972 Cri LJ 451; *Kan til ai Shivabhai Thakkarv. State of Gujarat,* 1990 Cri Lj 2500 tGuj}.

cases is not the responsibility of the police unless otherwise ordered by a Magistrate.[56] The aggrieved private individual can, however, approach a Magistrate with a complaint and the Magistrate may take necessary steps for the trial of the offender,

(a) Information to the police as to non-cognizable offence.—If .any person gives information to an officer in charge of a police station of the commission of a non-cognizable offence, the officer shall enter or cause to be entered the substance of the information in a book prescribed for this purpose. The officer shall then refer the informant to the Magistrate. [S. $^{1}55(^{1})$] The police officer has no further duty unless he is ordered by a Magistrate to investigate the case.

(b) Pouters of the police to investigate a non-cognizable case depend on Magistrate's order.—The primary rule is that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. [S. 155(a)] The Code does not expressly give power to a Magistrate to order investigation into a non-cognizable case. Such a power, however, can be implied from the wording of Section 155(a). The Code does not give any direction or guidance to the magistrates as to how and in what circumstances the power to order investigation is to be exercised. Certainly the power is not to be exercised arbitrarily or capriciously. Probably the Magistrate is to consider the totality of the circumstances and consider whether it would not be just and proper to ask the police to investigate the non-cognizable case.

If a Magistrate, who is *not empowered,* erroneously orders in good faith an investigation under Section 155(2.), the proceedings shall not be set aside merely on the ground of his not being so empowered. [see,'S. ^{A}*6o[b)]*

If a police officer investigates a non-cognizable case without the order of a Magistrate, such a non-conformance to the mandatory provisions laid down in Section 155(2) may be a material one vitiating the ultimate proceedings and may also be considered as violative of Article 21 of the Constitution.[57] However, whether the non-compliance with Section 155(2) is material one vitiating the proceedings depends upon the facts and circumstances in each case. When such a breach is brought to the notice of the court at an early stage of the trial the court will have to consider the nature and extent of the violation and pass appropriate orders for such re-investigation as may be called for. However, generally speaking, if such a breach is not noticed at the early stage and the trial is concluded the defect or illegality of investigation would not vitiate trial, unless it caused

56. *See,* earlier discussion in para.

5/. *Subodh Singh* v. *State,* 1974 Cri Lj 185 (Cal); see also, *P. Kitnbumubammed* v

prejudice to the accused and resulted in miscarriage of justice in terms of Section 4653ˢ

{c} A case consisting of both cognizable and non-cognizable offences.—

In a situation where a criminal case consists of both cognizable and noncognizable offences, a question may arise as to whether the case is to be treated as a cognizable case or a non-cognizable case. To meet such a situation Section 155(4) provides that "where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are noncognizable". A case alleging commission of offences under Sections 494 and 498-A IPC could be investigated by the police, though offence under Section 494 is a non-cognizable offence, by virtue of Section 155(4)J''[9]

{d) Powers to investigate a non-cognizable case.—Where a Magistrate under Section 155(2} gives an order to a police officer to investigate a noncognizable case, the police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case. [S. 155(3)]

Initiation of investigation 8.5

Usually, in case of cognizable offences, the investigation is initiated by the giving of information under Section 154 to a police officer in charge of a police station. However, such FIR is not an indispensable requisite for the investigation of crime. Even without any FIR, if a police officer in charge of a police station has reason to suspect the commission of a cognizable offence, he can proceed to investigate the offence under Section 157(1)3°

The police, of course, have no unfettered discretion to commence investigation under Section 157. They can exercise the power of investigation only if the FIR or other relevant material prima facie discloses the commission of a cognizable offence.[58 59 60 61] A Magistrate under certain circumstances can also order a police officer in charge of a police station to investigate a cognizable or even a non-cognizable case. Some of these matters are contained in Section 156 which is as follows:

58. For the text of S. 465, *see,* para. 7.9. See, *H.N. Rishbud* v. *State of Delhi,* 1955 Cri LJ 526: AIR 1955 SC 196; P. *Kunhumuhammed* v.

59. *State of Orissa* v. *Sharat Chandra Sahu,* {1996) *6* SCC 435: 1996 SCC (Cri) 1387: AIR 1997 SC 1.

60. *See,* discussions in *State of Maharashtra* v. *Sara ngdha rs 1 ngh Shivdassingh Chauan,* (2011} 1 SCC 577: {2011) 1 SCC {Cri} 477 disapproving Chief Minister's instructions to the police not to

61. *State ofW.B.* v. *Siuapan Kumar Guha,* {1982} 1 SCC 561: 1982 SCC (Cri) 283: 1982 Cri LJ 819; *see,* observations in *State ofW.B.* v. *Sampat Lai,* {1985) 1 SCC 317: 1985 SCC (Cri) 62: 1985 Cri LJ 516. *See also,* observations in *Ram Birajt Deni* v. *Utnesh Kumar*

Police officer's power to investigate cognizable

156. (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned.

Sub-section (i) of Section 156 confers wide powers on the police to investigate a cognizable offence without the order of a Magistrate. This statutory right of the police to investigate cannot be interfered with or controlled by the judiciary.[62] If, however, the FIR or other relevant materials do not prima facie disclose any cognizable offence, the police in that case have no authority to investigate. In such a case the High Court, in the exercise of its inherent powers under Section 48a or in the exercise of powers under Article 226 of the Constitution can stop and quash such an investigation.[63]

The latter part of sub-section (1) of Section 156 determines the local jurisdiction of the police officer in charge of a police station to investigate cognizable offences. Such officer has power to investigate all such offences as would be triable under Chapter XIII [*i.e.* Ss. 177-89] of the Code by a court having jurisdiction over the local area within the limits of such police station. These rules (contained in Ss. 177-89) would enable a police officer to investigate certain offences committed even beyond the local limits of his police station.[64] The rules shall be discussed in the next chapter *i.e.* Chapter 9. Sub-section (2) of Section 156 makes it clear that an irregularity in investigation does not vitiate proceedings or trial.[65]

62. *King Emperor* v. *Khivaja Nazir Ahmad,* (1945) 46 Cri Lj 413: U943-44) 7' IA 203: {1945) 58 LW 57: AIR 1945 PC 18; *State ofW.B.* v. *S.N. Basak,* {1963) 1 Cri Lj 341: AIR 1963 SC 447; *H.N. Rishbud* v. *State of*

63. *P tate off W.B.* v. *Swapan Kumar Cuba,* {1982) 1 SCC 560 1982 SCC (Cri) 283: 1982 Cri Lj 819- *R.P. Kapur* v. *State of Punjab,* i960 Cri Lj 1239: AIR i960

64. *SaWinder Kaur* v. *State (Govt, of*

65. *H.N. Rishbud* v. *State of Delhi,* 1955 Cri LJ 526:

According to Section 156(3) any Magistrate empowered under Section 190 can order a police officer in charge of a police station to investigate any cognizable offence. Section 190 provides that, subject to certain restrictions on taking cognizance in respect of certain offences, any Magistrate of the first class, or any Magistrate of the second class specially empowered in this behalf by the Chief judicial Magistrate, *may* take cognizance of any offence: *a)* upon receiving a complaint of facts which constitute such offence; or *b)* upon a police report (challan) of such facts: or *c)* upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed. A Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage. [66] Usually it is for the police to register the case.[67] [68] However, on perusal of a report the Magistrate can order registration of the case[65] under Section 156(3). But he has no authority to order investigation by an agency other than an officer in charge of a police station.[69] It has been held that a Magistrate issuing process on the basis of a complaint, when the police report on the earlier complaint to them was received, was not proper. He ought to consider the police report as well.[70] When a complaint is filed before a Magistrate, the Magistrate instead of taking cognizance of the offence, may simply order investigation by police under Section 156(3)7* [72] A complaint disclosing a cognizable offence may be such as to require a thorough investigation by the police, and that is why power is given to the Magistrate under Section 156(3) to send the complaint to the police for investigation."[72]

In this connection it may be noted that it is only at the pre-cognizance stage that the Magistrate forwards the complaint under Section 156(3) to police for investigation. When the Magistrate initiates action under

State of Bihar, 1956 Cri Lj 441: AIR 1956 SC Z58; *Niranjan Singh* v. *State ofU.P.,* 1957 Cri LJ 294: AIR 1957 SC 142.

66. *Tula Ram* v. *Kishore Singh,* (1977) 4 SCC 459: 1977 SCC (Cri) 621: 1978 Cri Lj 8; D. *Lakshminarayana* v, *V. Narayana Reddy,* {1976} 3 SCC 252, 258: 1976 SCC (Cri) 380: 1976 Cri Lj 1561; see also, *Kanaksinh Hathisinh Jadeja* v. *Blabhadrasinh Narendraisinb*

67. *See* discussions in *Indrajit Mukherjee* v. *State ofW.B.,* 1995 Cri Lj 3250 (Cal); A. *Nallasivan* v. *State of T.N.,* 1995 Cri LJ 2754 (Mad); *Naurata Ram* v. *State of Haryana,* 1995 Cri Lj 1568 (P&H), *Madbu Bala* v. *Suresh Kumar.* (1997) 8 SCC 476: 1998

68. *Charan Singh* v. *State hfHaryana,* 1994 C ri LJ 1003 (P& H).

69. *State of Kerala* v. *Kolakkacan Moosa Haji,* 1994 Cri Lj 1288 (Ker); *Kuldip Singh* v. *State,* 1994 Cn Lj 2502 (Del); also see, *Indumati* M. *Shah* v. *Narendra Muljibhai Asra,* 1995 Cri LJ918 (Guj).

70. *Jagdish Ram* v. *State of Rajasthan,* 1989 Cri LJ 745 (Raj).

71. See, *Srinivas Gundluri* v. *SEPCO Electric Power Construction Corpn.,* (2010) 8 SCC 206: {2010} 3 SCC (Cri) 652: 2010 Cri Lj 4457. See also, *Babu Lai* v. *State of Rajasthan,* 2009 Cri Lj 4362

72. *Copal Das Sindhi* v. *State of Assam, {1961)* 2 Cri LJ 39: AIR 1962 SC 986; see also,-State *of Assam* v. *Abdul Noor,* (1970) 3 SCC 10: 1970 SCC (Cri) 360: 1970 Cri Lj 1264; *famuna Singh* v. *Bhadai*

Section 202, it is after taking cognizance that he issues process.[73] It has been opined that if a Magistrate has acted upon a complaint under Section 202, it may not be possible for him to send up the complaint to the police under Section 156(3) for investigation.[74] However, in a case, after the investigation report under Section 156(3} and examination under Section 202 the Magistrate again sent the complaint to the police. The Karnataka High Court ruled that such a step could be taken by the Magistrate as he is entitled under Section 202 to order further investigation.[75] Here the accused did not appear. Nor was he summoned. Hence the Magistrate's sending the complaint again to the police was held proper. The court clarified its reasoning thus:

> I hold that the Magistrate has jurisdiction to direct the police to investigate into the matter after taking cognizance and recording the sworn statement of complainant and witnesses under Section 202(1} of Criminal Procedure Code. However, it is made clear that the Magistrate has no power to direct investigation after the accused appeared before the Court, on being summoned.[76]

Before a Magistrate directs investigation under Section 156(3) he has to notionally decide that investigation by police is needed and inquiry by himself might not be sufficient. It has been suggested that the Magistrate should be required to record reasons for his decision.[77]

It has also been suggested that in case a Magistrate refuses to order the police to register a complaint, the Sessions Court could be approached by way of revision seeking an order under Section 156(3} to the police to register the complaint for investigation.[78] The accused does not have right to be heard on the investigation procedures in the case[79] [80]. Nor does he have right to get a copy of preliminary report prepared by the CBI as a prelude to the inquiry.

The police in complaints sent to them under Section 156(3} may make the investigation of the offence and send a report (challan) to the Magistrate under Section 173. In such a case when cognizance is later taken by the Magistrate, it would be deemed to have been taken on the police report and not on the original complaint. The question whether cognizance of the offence has been taken by the Magistrate on *a* complaint or on a police

73. *Natbu* v. *State of Rajasthan,*
74. *Zahir Ahmed* v. *Azam Khan,* 1996 Cri Lj 2.90
75. *Bharatiben Verma* v. *N.G. Lokanath,* 199S
76. *Ibid,* 19.
77. *Suresh Kumar Gupta* v. *State of Gujarat,* 1997 Cri L] 3948 (Guj); also see,
78. See, *Shiv Singh v. State ofM.P.,* 2009 Cri Lj
79. See, *Narender G. Goelv. State of*
80. See, *Ram Chandra Singh x. Supt. of Police,*

report, is of some importance, because the trial procedure in respect of cases Instituted on a police report is different from that in other cases. This is particularly so in trial of warrant cases and trial before a Court of Session.[81]

The power conferred upon the Magistrate under Section 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation.[82] He has, however, no power to recall an investigation ordered by him.[83]

A Magistrate empowered to take cognizance of an offence under Section 190 may, instead of ordering an investigation under Section 156(3), proceed to take cognizance of the offence on a complaint and examine the complainant under Section 200. Then the Magistrate may, if he thinks fit, postpone the issue of process {summons or warrant) against the accused, and either inquire into the case himself or *direct an investigation to be made by a police officer* or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. [S. 202{1)3

When a complaint is sent to a police officer under Section 202 for investigation and report, the officer has all the powers which may be exercised by a police officer in the course of an investigation. He is to investigate in precisely the same manner as he would have done if his powers had been first invoked by a FIR under Section 154.[84] The report of the police officer is useful for the purpose of deciding whether or not there is sufficient ground for proceeding *i.e.* whether the process is to be issued against the accused or whether the complaint is to be dismissed under Section 203. The cognizance of the offence being already taken by the Magistrate on the complaint, the subsequent police investigation and report under Section 202 will not make the case as one instituted on a police report. It has been ruled by the Patna High Court that if the Magistrate takes the cognizance of the offence on the inquiry report of the police officer, otherwise than under Section 173, the case made would not be treated as one instituted on police report inasmuch as the report would not amount to an investigation report.[85]

From the above discussion one can briefly conclude that the process of investigation may start:

81. ***See,*** Ss. 238-43 and Ss. 244-47; [illegible]*?* S. 207 and S. 208.
82. *State of*
83. See, discussi
84. ***Emperor*** v. ***Bikka Moti,*** {1938} 39 Cri Lj 681: AIR 1938 Sind 113, 124
85. *Tung Nath Ojha* v. *Haji Nasiruddin Khan,* 1989 Cri Lj 1846 (Pat).

(a) where FIR is given under Section 154; or

(b) where the police officer has otherwise reason to suspect the commission of a cognizable offence; [Ss. 157(1) & 156(1}] or

(c) where a competent Magistrate orders the police to investigate:

(i) a non-cognizable case; [S. 155(a)]

(it) by sending a complaint to the police under Section 156(3) without taking cognizance of the offence on a complaint under Section 200;

(Hi) after taking cognizance of the offence on a complaint for the purpose of deciding as to the issue of process against the accused. [S. 202(i)] & S. 203]

8.6 Procedure for investigating a cognizable offence

(1) The investigation of a cognizable offence begins when a police officer in charge of a police station has reason to suspect the commission of a cognizable offence. The basis for the suspicion may be the FIR received under Section 154, or the suspicion may be based on any other information of the police. Further, the offence must be such as the police officer has power to investigate under Section 156. In other words the police officer must have jurisdiction to investigate the offence. [S. 157(1}]

(2) Where a reasonable suspicion of the commission of cognizable offence exists, the police officer must immediately send a report of the circumstances creating the suspicion, to a Magistrate having power to take cognizance of such offence upon a police report. [S. 157(1)] This provision is really designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 1551. The purpose and object of Section 157 becomes clear from the combined reading of Sections 157 and 159. They have dual purpose; *firstly,* to avoid the possibility of improvement In the prosecution story and introduction of any distorted version by deliberations and consultation and *secondly,* to enable the Magistrate to have a watch on the progress of the investigation.[86] [87] The Magistrate mentioned in Sections 156(3) and 157(1) is the Judicial Magistrate.[87] [88]

The importance of prompt dispatch of a copy of the FIR to a Magistrate empowered to take cognizance of such an offence can be hardly overemphasised. The time at which the report is received By the Magistrate concerned goes a long way in coming to the proper conclusion as to time at which the FIR may have been written, lodged or registered.[88] Failure to send a report to the Magistrate as required by this provision is a breach of

86. *Bathuia NagamaUeswara Rao* v. *State,* /2005] 11 SCC 72,2,: (2008) 3

87. See, *Bateswar Singh* v. *State of Bihar,* 1992 Cri LJ 2122 (Pat).

88. *Su/aran Si?igb* v. *State,* 1981 Cri Lj 364 (P&H); see also, *Kamalj it Singh* v.

duty and may go to show that the investigation in the case was not just, fair and forthright and that the prosecution case must be looked at with great suspicion. In *State* v. *Nidban Singh*[89], the High Court of Jammu and Kashmir observed that the prompt lodging of the FIR, to a great extent, brings out the spontaneous version of the occurrence and rules out the possibility of a coloured and thought-out version being put up. The legislature by providing in Section 157 CrPC that the officer incharge of the police station shall forthwith send a copy of the report to the Magistrate concerned provided an external check for the prompt lodging of the FIR. This section provides a safety valve in cases where the FIR is either ante- timed or antedated. The receipt of the special report by the Magistrate in time lends credence to the prompt lodging of the FIR and as unexplained delay In the receipt of the special report by the Magistrate concerned creates a doubt about the promptness of the FIR and puts the court on its guard. No doubt, the non-compliance of Sections 154 and 157 does not constitute a ground to throw away a prosecution case but it does emerge as a factor to be seriously reckoned with while appreciating the entire evidence. Its non-observance is bound to cast some shadow on the case, obviously to its detriment, because of the adverse inference.[89 90] However, where the FIR, was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity, then howsoever improper or objectionable the delayed receipt of the report by the Magistrate concerned be, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable.[89 90 91]

The State Government may direct that every such report shall be sent to the Magistrate through a superior police officer appointed by the State Government for this purpose; and if such direction has been given by the State Government the report shall be submitted to the Magistrate through such superior officer of the police. [S. 158(1}] The superior officer may give such instructions to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on the report, transmit the same without delay to the Magistrate. [S. 158(2)]

(3) The police officer in charge of the police station shall then proceed to the spot to investigate the facts and circumstances of the case and, if necessary, to take measures for the discovery and arrest of the offender. [S. i57(i)][92] Such police officer instead of doing all these things in person

89. 1984 CriLJ 1361 (J&K).

90. *Mahabir Singh* v. *State,* 1979 Cri Lj 1159 (Dei); see also,

91. *Pala Singh* v. *State of Punjab,* {1972} 2 SCC 640: 1973 SCC (Cri) 55, 60: 1973 Cri Lj 59. *See also,* observations in *Gurpreet Singh* v. *State of Punjab,*

92. *See,* observatio n in *Om Prakask Srivastava* v. *Union of India,* {2005) 12 SCC 458: {2006)

may depute one of his subordinate officers not below such rank as the State Government may by order prescribe in this behalf. [S. 157(1)]

There are, however, two circumstances in which it is not necessary for the police officer in charge of a police station to proceed to the spot and to investigate the case. These circumstances are as follows:

(a) Where the case is not of a serious nature and the information as to the commission of the offence has been given against any person by name, [proviso (a) to S. 157(1)] The police officer in such a case is required to state in his report to the Magistrate his reasons for not proceeding to the spot for investigation. [S. 157(2)] The Code has not given any guidance to the police officer as to the circumstances in which the case might be considered as "not serious". However, if the police officer wrongly considers a case as "not serious" or otherwise, the superior police officer through whom the report is sent to the Magistrate, can always give appropriate directions to the officer in charge of a police station to set right the course of his action.

(b) If it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation he shall not investigate the case, [proviso (b) to S. 157(1)] Here again the police officer is required by the Code to state in his report his reasons for not proceeding to investigate. The police officer is further required to notify immediately to the informant, if any, in the manner prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated. [S. 157(2)] This would enable the informant to approach a Magistrate or a superior police officer for redress, if he feels aggrieved by the view taken by the police officer in charge of a police station. As the report to the Magistrate is to pass through the hands of a superior police officer, he can issue appropriate instructions to the officer in charge of the police station regarding the investigations into the case.

(4} The Magistrate receiving the abovesaid report of a police officer under Section 157, may direct an investigation, or if he thinks fit, may at once proceed to depute any Magistrate subordinate to him to proceed to hold a preliminary inquiry into, or otherwise to dispose of the case in the manner provided in the Code. [S. 159] This provision does not confer a Magistrate a general power to direct investigation. The power to direct investigation is to be used when it appears from the police report under Section 157 that the police are neglecting their duties or are desisting from investigation on insufficient grounds.[93] The Magistrate should not also add a new offence for investigation by the police.[94] The power of the police

93. *See,* 41st

94. See, *Sbariff Ahmed* v. *State (NCT of Delhi),* (2009) 14 SCC 184:

to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct investigation, or in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to inquire into the case.[95] However, it has been opined that the Magistrate is not entitled to order investigation by a senior police officer other than a police officer in charge of a police station.[96]

{5} When the police officer reaches the spot he will proceed to investigate the facts and circumstances of the case, and to arrest the offender. The procedure in respect of the arrest of the offender and the search and seizure of documents and things, has already been discussed.[97] The succeeding paragraphs deal with the powers of the police to require attendance of persons and to record their statements for the purposes of investigation.

Here it may be noted that when any subordinate police officer has made any investigation (under Chapter XII of the Code) he is required to report the result of such investigation to the officer in charge of the police station.

[S. 168] Thereupon the officer in charge of the police station can, on his satisfaction submit to the concerned Magistrate his report, may be charge-sheet or final report.[98]

Police officer's power to require attendance of witnesses 8.7

According to Section 160(1), an investigating police officer can by order require the attendance before himself of any person, if the following conditions are satisfied:

{a) the order requiring the attendance must be in writing;

(b) the person is one who appears to be acquainted with the facts and circumstances of the case; and

(c) the person is within the limits of the police station of the investigating police officer or is within the limits of any adjoining police station.

95. S.N. *Sha*

96. *State hf Kera la* v. *Kola kkac an Moo sa Haji,* 1994

9 /. *See supra,* C haps . 5, 6 and 7.

98. *S.N. Singh* v. *State of Bihar,* 1977 Cri LJ 1597 (Pat).

However, a person below 15 years of age, or above 65, a woman or a mentally or physically disabled person shall not be required to attend any place other than the place in which such person resides.[1][2] [proviso to S. 160(1)] This provision is intended to give special protection to children and women against the probable indignities and inconveniences that might be caused to them by the abuse of police powers under Section 160(1),~ There is a public policy, not complimentary to the police personnel, behind this legislative proscription which keep juveniles and females away from police company except at the former's safe residence. May be, in later years community confidence and consciousness will regard the police force as entitled to better trust and soften the stigmatising or suspicious provisions now writ across the Code.[3]

It is the legal duty of every person to attend if so required by the investigating police officer, *[see,* S. 160(1)] Where such person intentionally omits to attend, he is liable to be punished under Section 174 IPC. However, the police officer has no authority to use force to compel attendance of such person; nor does he have any power to arrest or detain such a witness. In a case wherein the allegation was that the girl-inmates of an ashram were raped by its founder threatening them of dire consequences if they disclosed his misdeeds, the police removed the victims from the ashram for interrogation at women police stations. This was to facilitate their speaking the truth without fear. It was held by the Supreme Court that in this case Section r60 was not violated.[4] It may be noted that a Magistrate has no power to issue any process compelling a person to attend before a police officer.[5] Nor is an order made under Section 160 by the police officer an order promulgated by a public servant to attract Section 1S8 IPC for its non-compliance.[6] The Gauhati High Court opined that the police can require witnesses to attend police station if they reside within limits of the station or adjoining police station.[7]

Any State Government, if it so desires, may make rules and provide for the payment by the police officer of the reasonable expenses of every person attending as required at any place other than such person's residence. [S. 160(2)] As the payment of expenses to person attending before police officers would involve substantial financial burden on the State

1. *See,* Criminal Law (Amendment) Act, 2.013.
2. *Niloy Dtitta v. District Magistrate, Sibsagar,* 1991 Cri LJ 2933 (Gau). A *Iso see,* discussions in *State* v. N.M.T. *Joy Immaculate,* (2004) 5 SCC 729: 2004 SCC (Cri) 1722: 2004 Cri LJ 2515.
3. *Nandini Satpathy* v. P.L. *Dam,* (197S) 2 SCC 424: 1978 SCC (Cri) 236, 23d: 1978 Cri Lj 968, 982.
4. *Kamalananlha* v. *State ofT.N.,* (2005) j SCC 194: 2005 SCC (Cri) 1121: AIR 2005 SC 2-132.'
5. *Queen Empress* v. *Jogendra Nath Mukerjee,* ILR (1897) 24 Cal 320; see also, *M.N. Sreedharan* v. *State of Kerala,* 1981 Cri Lj 119 (Ker).
6. T. *Purshotham* v. *Circle Inspector of Police,* 1997 Cri LJ 4011 (AP).
7. See, *Pusma Investment (?) Ltd.* v. *State of Meghalaya,* 2010 Cri Lj

Government it was thought appropriate to leave the matter entirely to the State Government to make rules for such a provision.[8]

Examination of witnesses by police 8.8

Sections 161 and 162 dealing with the oral examination of witnesses by the police, the record to be made of their statements and the use to which it may be put subsequently, form the crux of Chapter XII of the Code, It has been ruled by the Delhi High Court that the statements recorded by the police officers and the documents hied in support of them with the officers are public documents that can be obtained from them by the citizens.[9] They have attracted a variety of comments and variety of suggestions.[10]

The object of Section 161 is to obtain evidence which may later" be produced at the trial. In case of trial before a court of session or in case of trial of a warrant-case, a charge may be framed against the accused on the basis of the statements recorded by the police under Section 161.

Before trial, copies of such statements are to be furnished to the accused, free of cost.[11] This requirement is also applicable to the accused in a case instituted otherwise than on police report, but investigated by police.[12] He is thereby enabled to know before his trial the nature and volume of evidence against him. A statement of a person recorded by the police may under certain circumstances be used for the purposes of contradiction under Section 145, Evidence Act, if such person is called as a prosecution witness.

According to Section 161(1), any person supposed to be acquainted with the facts and circumstances of the case can be orally examined:

{a} by a police officer making an investigation of the case; or *(b)* on the requisition of such officer, by any police officer not below such rank as the State Government may by order prescribed in this behalf.

The words “any person” in Section 161(1) include any person who may be accused of the crime subsequently.[13] The expression “any person supposed to be acquainted with the facts and circumstances of the case” includes an accused person who fills that role because the police suspect him to have committed the crime and must therefore, be familiar with the facts.[14] The

8. Joint Committee Report, p. XV.
9. *Ram Jethmalani* v. *CBl,* 1987 Cri Lj 570 (Del).
10. 41st Report, Vol. 1, p. 69, para. 14.7.
11. *See,* Ss. 207 and 208.
12. *Viniyoga International* v. *State,* 1985 Cri LJ 761 (Del).
13. *Dinanatb* v. *Emperor,* (1940) 41 Cri LJ 757: AIR 1940
14. *Nandini Satpathy* v. *P.L. Dani,* (1978) 2 SCC 424: 1978 SCC (Cri)

accused person, even after his remand to judicial custody, can subject to his right to silence, be questioned by the police with the permission of the Magistrate in any place and manner which do not amount to custody in the police.[15]

Where a person is being examined by a police officer under Section 161(1), he is required to answer truly all questions put to him by such officer.[16] He is, however, not bound to answer such questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. [S. 161(2)] It is quite important for effective investigation that every person questioned by the police officer must furnish, and must be under a legal duty to furnish, all information available with him to the police. Logically, the law must also require that the information is not false or misleading.[17] If a person, being legally bound to answer truly all questions relating to such case refuses to answer any such question demanded of him, he shall be liable to be punished under Section 179 IPC. Further, if such a person gives an answer which is false and which he either knows or believes to be false or does not believe it to be true, he is liable to be punished under Section 193 IPC for giving false evidence. Probably, such a person is also liable to be punished under Section 177 for furnishing false information. An apprehension has been voiced that the fear of prosecution in the minds of persons who would be questioned by the police, may in practice impede investigation. It is difficult enough to get witnesses to speak to facts relevant to the investigation of an offence; if the threat of prosecution were to be held over their heads, it might deter witnesses still further from giving information and seriously impede the investigation. It might also be, that notwithstanding that the version of a witness is true, the final result of the prosecution might be the discharge or acquittal of the accused; in such an event, the witness's version might well be held to be untrue and the witness might become liable to prosecution.[18] However, it may be kept in mind that, in practice, it would be extremely difficult to prosecute a person successfully for giving false answers to questions put to him by the police during investigation. Because, the recorded statement is not signed by the person making it; and there is no guarantee of the accuracy of the record of the statement of a witness by the investigating police officer.

Though Section 161(2) requires a person, including an accused person, to answer truly all questions (relating to the case under investigation) put to him by the investigating police officer, that section as well as Article 20(3) of the Constitution give protection to such person, against

15.
16. See, *Bba*
17. 41st lS. 14th Report,

questions the answers to which would have a tendency to expose him to a criminal charge. The accused person may remain silent or may refuse to answer when confronted with incriminating questions. Article 2.0(3} clearly provides as a fundamental principle that no person accused of any offence shall be compelled to be a witness against himself. In this connection the Supreme Court has held that the area covered by Article 2.0(3) and Section 161(2) is substantially the same and Section 161(2), Criminal Procedure Code, 1973 (CrPC) is parliamentary gloss on the constitutional claused[9]

In the *Nandini Satpathy case*[19] [20] the Supreme Court has extensively considered the parameters of Section 161(2) CrPC and the scope and ambit of Article 20(3) of the Constitution.

According to the Supreme Court, the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that.[19] * [21]

Tendency to expose to a criminal charge is wider than actual exposure to such charge. In determining the incriminatory character of an answer the accused is entitled to consider—and the court while adjudging will take note of—the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate.[22]

"Compelled testimony" has been considered as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20(3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.[23]

Having discussed the main principles, the Supreme Court addressed itself to the further task of concretising guidelines with a view to give full social relevance to its judgment:

19. *Nandini Satpathy* v. *P.L. Dani,* (1978) 2 SCC 424: 1978 SCC (Cri) 236, 256: 1978 Crt LJ 968, 982.

20. *Ibid.*

21. *Ibid, 266.*

22. *Ibid,* 267.

23. *Ibid, 266.*

1. If an accused person expresses the wish to have his lawyer by his side when the police interrogate him, this facility shall not be denied to him* However the police need not wait more than for a reasonable while for the arrival of the accused's advocate. This requirement will obviate the overreaching of Article *zo{s)* and Section 161{z).
2. The police must invariably warn—and record that fact—about the right to silence against self-incrimination; and where the accused is literate take his written acknowledgement.
3. After an examination of the accused, where lawyer of his choice is not available, the police official must take him to a Magistrate, doctor or other willing and responsible non-partisan official or nonofficial and allow a secluded audience where he may unburden himself beyond the view of the police and tell whether he has suffered duress, which should be followed by judicial or some other custody for him where the police cannot reach him. That collocutor may briefly record the relevant conversation and communicate it to the nearest Magistrate.

After giving these guidelines, the Supreme Court however added, "we do not mandate but strongly suggest".[24 25]

The question whether the guidelines laid down in the *Nandini Satpathy case*[2] were in the nature of binding direction was raised before the Delhi High Court. After considering the observations in *Miranda* v. *Arizona*[24 25 26], the High Court felt that subject to a few exceptions, Section *x6z* CrPC and Sections 24 to 30, Evidence Act, do take care of the constitutional rights by excluding from evidence all self-incriminatory statements whether voluntary or otherwise and therefore there was no need to give any directions. The High Court thought that the main concern of the Supreme Court in the *Nandini Satpathy case* is to sensitise the police to humanism; and therefore it made it prudent for the police to allow a lawyer where the accused wants to have one at the time of interrogation, if it wants to escape the censure that its interrogation is carried on In secrecy by physical and psychic torture. The High Court held that the Supreme Court was not laying down a binding direction but only prudent policy for the police.[57] In this connection it is pertinent to note that the Supreme

24. *Ibid,* 2.68-69; [see] also, *Abdul Rajak Mobd.*
25. *Nandini Satpat*
26. 16 L Ed
27.

Court in *D.K. Basu* v. *State* of W.B.[28], has issued several instructions to be observed by the police. And one of the instructions is a direction to the police to permit the arrested to meet his lawyer during interrogation.[29]

The police officer may reduce into writing any statement made to him in the course of the examination of a person; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. [S. 161(3)] This provision gives wide discretion to a police officer to record or not to record, any statement made to him during investigation. This appears to be necessary also. A police officer investigating crime has to question, and then to examine orally a large number of persons, many of whom may have no useful information to give, and much of the information is later found to be pointless. It would be too great a burden on him if he should be required by law to reduce into writing every statement made to him; nor would it serve any purpose apart from distracting attention from the main task.[30] Further, "this discretion is, in practice, not capable of being abused, nor have we heard any complaint that it is being abused. There has been no lack of complaint that the record prepared by the investigating officer is not accurate, but no serious complaint that the statements of material witnesses are not recorded".[31] [32] [33] [34] [35] [36]

The statement of victims of offences under Sections 354 to 354-0, 376, 376-A to 376-E or Section 509 IPC are required to be recorded by a woman police officer or woman officer. At present it may be required to be recorded by a Judicial Magistrate in terms of Section 164(5A). The Magistrate shall take the help of an interpreter or special educator if the victim is temporarily or permanently disabled. He should also get the recording videographed. The statement of the temporarily or permanently mentally or physically disabled person shall be considered a statement in lieu of examination-in-chief as specified in Section 137, Evidence Act.[32] [33] [34] [35]

The question whether an accused should be given the gist of interrogation if they are taken as statements under Section 161(3) came to be answered in the negative in *State (NCT of Delhi)* v. *Ravi Kant Sharma*[33]. In this case the Supreme Court examined both *Sunita Devi* v. *State of Bihar*[34] and *Sidharth* v. *State of Bihar*[35] the interpretation of which in *Shamshul Kanwar* v. *State of U.P,*[36] *(Shamshul Kanwar)* had the Delhi

28. {1997) 6 SCC 642: 1997 Cri LJ 352.5.
29. *Ibid.* Instruction (TO).
30. *ibid,* 70 para. *14.9.*
31. See, Ss. 15 and 16, Criminal Law (Amendment) Act, 2013.
32. (2007) 2 SCC 764: (2007} 1 SCC (Cri) 640: 2007 Cn Lj 1674.
33. (2005) i SCC 608: 2005 SCC (Crs) 435.
34. (2005) 12 SCC 545: {2006) 1 SCC (Cri) 175.
35. (T995) 4 SCC 430: 1995 SCC (Cri) 753.
36.

High Court to direct the police to supply gist of interrogation to the accused. Interpreting the *Sbamsbul Kanwar case*[37 38 39], the Supreme Court clarified the position thus (para. 13):

> As rightly submitted by learned counsel for the appellant, in different States case diaries are maintained in different ways. Some States have a composite case diary which includes the statements recorded under Section 161 CrPC as well as the observations of the investigating officer under Section 172 CrPC. This Court, therefore, in *Sbamsbul Kanwar case* held that the statements under Section 161 need to be separated from observations which are recorded under Section 172 in order to make available the statement under Section 161(3)[to] the accused.

The above provision contained in Section 161(3) does [not] require a person making a statement to a police officer to sign it as that might lead to abuse of power by the police. In some cases at least it might facilitate a police officer to obtain the signature of a witness by compulsion to a statement recorded by such officer and when faced with this statement at the subsequent stages of trial the witness would find it difficult to go against the statement recorded by the police, although he may be anxious to state the truth before the court.[38 39] Section 162,(1) clearly enjoins that no statement made by any person to a police officer in the course of an investigation under Chapter XII of the Code, shall, if reduced to writing be signed by the person making it. The provision is intended as a statutory safeguard against improper police practices; and a contravention of the provision will be considered as impairing the value of the evidence given by the person making and signing a statement before the police during the investigation of a crime.[59] However, the Supreme Court clarified that if an investigating officer has by mistake obtained the signature of the accused on the seizure memo in violation of Section 162(1) it shall not vitiate the whole proceedings.[40]

During investigation, the statements of witnesses should be recorded as promptly as possible. Unjustified and unexplained long delay on the part of the investigating officer in recording a statement of a material witness during the investigation may render the evidence of such witness unreliable.[41] Considered in the light of surrounding circumstances, the inordinate delay in the registration of the "FIR" and further delay in recording the statements of material witnesses, was held to cast a cloud of suspicion

37. *ibid.*
38. Joint
39.
40. ***Stat7***
41. ***Bala krus***

on the credibility of the entire warp and woof of the prosecution story.[42] However the question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case.[43]

The investigating officer is required by Section 161(3) [to] make a separate and true record of the statement of each person whose statement he records. Omission to do so would amount to an attempt to circumvent the law*.[44] In this context it is also to be noted that while using the case diary the court should keep in mind the restrictions under Section 162 of the Code and Section 145, Evidence Act, 1872 because what is proposed to be used is subject to restrictions on recorded material under Section 161 of the Code.[45] If the investigating police officer records only one joint statement of several witnesses during the investigation, such a statement is clearly a contravention of Section 161(3). However, it would not render these persons as incompetent witnesses or render their evidence as inadmissible; it can only affect the weight to be attached to their evidence.[46] Whether non-compliance with Section 161(3) would vitiate the entire trial would depend upon the circumstances and facts of each case; and unless the non-compliance has caused prejudice to the accused in his defence and has resulted in a failure of justice, *it* would not invalidate the trial.[47]

The word "statement" under Section 161 includes both oral and written statements and it will also include signs and gestures. The words in Sections 161(3) and *62 mean all that is stated by a witness to a police officer or officers during the course of investigation.[48]

A new proviso to Section 161(3} in the following terms has been incorporated with effect from 31 December 2009:[49]

> Provided that statement made under this sub-section may also be recorded by audio-video electronic means.

It is therefore now possible for the police to record the statements by audio-video means.

42. *Ganesk Bbauan Patel* v. *State of Maharashtra,* (1978) 4 SCC 371: 1979 SCC (Cri) 1: 1979 Cri LJ 51: AIR 1979 SC 135.
43. ***Ranbirv. State of Punjab,*** {1973) 2 SCC 444: 1973 SCC (Cri) 858: 1973 Cri Lj 1120, 1123;
44. ***Bahrain Tikaram Marathe*** v. ***Emperor,*** (1945} ***46*** Cri Lj 448:
45. ***State of Kerala*** v. ***Babu,*** (1999) 4 SCC 621: 1999 SCC (Cri) 611.
46. ***Tilkesbwar Singh*** v. ***Slate of Bihar,*** 1956 Cri LJ 441: AIR 1956 SC
47. ***Asservadam, re,*** 1956 Cri LJ 11S3: AIR 1956 AP 199; ***Royappan. re,*** 1955 Cri LJ 1200: AIR 1955 Mad 512; ***Tilkesbwar Singh*** v. ***State of***
48. *Asan Thar ay il Bab4* v. *State of Kerala,* 1981 Cri Lj 1165, 1169 (Ker).
49. ***Ins.*** by Act 5 of 2009, S. 12 (w.e.f. 31-12-2009).

8.9 Evidentiary value of the statements made to the police during investigation

A statement recorded by police officer during investigation is neither given on oath nor is it tested by cross-examination. According to the law of evidence such statement is not evidence of the facts stated therein and therefore it is not considered as substantive evidence.[50 51] And it is considered no evidence to initiate criminal cases under Sections 194 and 195 IPCA But if the person making the statement is called as a witness at the time of trial, his former statement, according to the normal rules of evidence could be used for corroborating his testimony in court or for showing how his former statement was inconsistent with his deposition in court with a view to discredit him.[50 51 52] However, the normal rules of evidence have been substantially modified by Section *i6z* which is as follows:

Statements to police not to be signed:
Use of statements in evidence

> 162.. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
>
> {2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (r) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.
>
> *Explanation*.—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

The word "statement" appearing in Section 161(3) and Section 162 constitutes the entirety of facts stated by a witness when he was examined on different dates by the same investigating officer or different investigating officers. Therefore the expression "statement or any part of such

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statement" appearing in Section *i6z* is not confined to a single statement given by a witness to a particular officer but takes in all the statements given by a witness at different stages or on different dates to different investigating officers or the same investigating officer.[53]

The section prohibits the use of the statements made to the police during the course of the investigation for the purpose of corroboration. It is based on the assumption that the police cannot be trusted for recording the statements correctly and that the statements cannot be relied on by the prosecution for the corroboration of their witnesses as the statements recorded might be of self-serving nature. However, as would be seen from the proviso to Section 162(1}, and sub-section (2) of Section 162, there is not a total ban on the use of the statements made to police officers. The defence is not deprived of an opportunity to discover what a particular witness said at the earliest opportunity.

The object of the section is to protect the accused both against overzealous police officers and untruthful witnesses.[54]

It has been ruled by the Supreme Court that Section 162 does not provide that evidence of a witness in the court becomes inadmissible if it is established that the statement of the witness recorded during investigation was signed by him at the instance of the police officer.[55]

Statements recorded by the police during the course of investigation are often taken down in a haphazard manner in the midst of a crowd and confusion. If the statement is not reliable for Its accuracy and should not therefore be used for corroboration, by the same logic it is equally unreliable and should not be used for contradiction. However, as observed by the Law Commission, "there is a material difference between contradiction and corroboration and what is good enough for contradicting a witness is not always good enough for corroborating him. the policy of law in permitting a witness to be contradicted by a police statement and not permitting him to be corroborated by the same statement is basically sound and sensible."[56]

The section provides that

1. a statement made to the police during the course of the investigation of an offence, can be used in trial if the person making the statement Is called as a prosecution witness; 2. the statement can be used for the purpose of contradicting such witness in the manner provided by Section 145, Evidence Act;

53. *Asan Tbarayil Baby* v. *Stale of Kerala,* 19Si Cri LJ 1165, 1169 (Ker).

54. *Kbatri (4)* v. *State of Bibar,* (1981) 2 SCC 493: 1981 SCC {Cri) 503, 507: 1981 Cri LJ 597; see aiso, *Baliram Tikaram Maratbe* v.

55. *State of*

56. 41st Report, Vol. 1. p. 74, para, .14.13; for the opposite view, forcefully expressed in the Not

3. the statement can be used for the above purpose *a)* by the defence, or *b)* with the permission of the court by the prosecution (This might be desirable if a prosecution witness is won over by the other side);
4. if any part of the statement is used for contradiction, any part of the statement can be used in the re-examination of the witness for the only purpose of explaining any matter referred to in his cross-examination*

If a person is called in trial as a defence witness, his former statement before the police cannot be used for contradicting him.[37] The reason appears to be that it would be improper to allow a witness to be contradicted by a record prepared by the opposite party.[38]

If a person is called as a court witness (under S. 311 of the Code), he is neither a prosecution witness nor a defence witness. Can his former statement before the police be used by the court for the purpose of contradicting him? Apparently, Section *x6z* does prohibit the use of such statement even by court. However, Section 162 is not explicit enough to control Section 165, Evidence Act which confers wide powers on the court to question a witness in order to secure the ends of justice. Considering the purpose of Section 162 and the mischief it was designed to prevent as well as its context, it has been held that the section must be confined in its scope to the use by parties only of statements mentioned therein.[57 58 59]

The bar created by Section 162 in respect of the use of any statement recorded by the police during the course of investigation is applicable only where such statement is sought to be used "at any inquiry or trial in respect of any offence under investigation at the time when such statement was made". If any such statement is sought to be used in any proceeding other than an inquiry or trial or even at an inquiry or trial but in respect of an offence other than that which was under investigation at the time when such statement was made, the bar of Section *i6z* would not be attracted.[57 58 59 60] Section 162 is enacted for the benefit and protection of the accused. But that protection is unnecessary in any proceeding other than an inquiry or trial in respect of the offence under investigation. The bar created by Section 162 has no application for example in a civil proceeding or in a proceeding under Article 32 or 22*6* of the Constitution, a proceeding under Section 452 of the code for disposal of property, and a statement made before a police officer in the course of investigation can be used as evidence in such a proceeding, provided it is otherwise relevant under the

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Evidence Act.[61] The Patna High Court has ruled that a Magistrate can issue process on the basis of a statement given to the police on an earlier occasion on the same matter.[62]

On the other hand, as the embargo in Section 162(1} operates only to the use of such statement "at any inquiry or trial in respect of any offence under investigation at the time when such statement was made", the bar under Section 162(1) applies not only to the trial held on the basis of a police charge resulting on an investigation but also to a trial held as a result of a private complaint, provided the trial is held in respect of an offence under investigation when the statement was made. The enabling proviso to Section 162(1) contains an exception to the bar or embargo and therefore, the proviso also must apply to all trials to which the bar or embargo relates. It must therefore follow that the proviso enables use of the case diary statement (as a statement or record under Section 161 is generally called) for the purpose of contradicting not only in a trial arising from a police charge, but also in a trial arising from a private complaint provided the trial relates to an offence under investigation when the case diary statement was made.[63]

Section 162 only bars proof of statements made to an investigating officer *during the course of investigation.* The section does not say that every statement made during the period of investigation is barred from being proved in evidence. Section 162 is aimed at statements recorded by a police officer while investigating into an offence. The statements sought to be excluded from evidence must be ascribable to the inquiry conducted by the investigating officer and not one which is dehors the inquiry.[64] The words "in the course of' in Section 162(1) imply that the statement must be made as a step in pending investigation. Therefore, where an investigation has already begun on the basis of a FIR, and then, in respect of the same offence another report is found to have been made quite inde- pendently of, and in no relation to, the pending investigation and was not designed to promote the pending investigation and has no reference at all to the investigation, the second report is not hit by the ban under Section 162.[65] Whether the investigation has commenced or not is a question of fact depending upon the circumstances in each case. Where two persons gave information at the police station about the commission of a

61. *Khatri* (4} v. *State of Bibar,* {1981) 2 SCC 493: 1981 SCC (Cri) 503, 507: 1981 Cri LJ 597; see also, *Mialakala Surya Rao* v. G. *Janakamma,* {1964) *1* Cri Lj 504: AIR 1964 AP 198; *Bal Kisban* v. *State of Rajasthan,* 1984 Cri LJ 308 (Raj); *Tbampi Chettiar*

62. *Gajendra Swaroop Srivasta9a* v. *Baleshwar Prasad Kesari,* 1988 Cri Lj 129 (Pat) (FB).

63. *Narayanan* v. *Krisbnan,* 1981 Cri LJ 563, 566 (Ker).

64. *Baleshwar Rai* v. *State of Bibar,* (1964} 1 Cri Lj 564, 566:

65. *Emperor* v. *Aftab Mohd. Khan,* {1940) 41 Cri LJ 647, 655: AIR 1940 All 291; *Tika Ram* v. *State,*

rape in a hotel, and the police officer without recording the information proceeded to the spot and recorded their statements there, it was held that rhe oral information given at the police station was the FIR and the subsequent statements recorded at the spot were hit by Section 162.[66] Where on hearing some rumours the police officer visited the place of occurrence but recorded the statement of a prosecution witness after coming back from the scene and registered the case the statement was held not hit by Section 162.[67]

A statement is a narration addressed to some person for whom it is meant and not to others who may overhear or who may happen to read it when written.[68] Every statement made to a person assisting the police during investigation cannot, however, be treated as a statement to the police. The previous statements of the *pancbas* which are to be found in the pre-trap and post-trap *panchanamas* in a corruption case do not fall within the phrase "statement made to the police officer"a$ contemplated by Section 162. Therefore the contents of such *panchanamas* would not come within the ban of that section and such previous statements could be legitimately used for corroboration under Section 157, Evidence Act.[69] A list of stolen articles given to the police during investigation is a statement hit by Section 162 but not a list given before investigation to supplement the FIR.

If a person identifies the property as the subject of the offence, or identifies a person as concerned in the offence, he may communicate his mental act of identification by express words or gestures. If in response to questions put by the police, the fact of identification is communicated by such person by finger, touch, nod or express words, such communication is a statement hit by Section 162.[70] However, if after arranging the identification parade the police leave the field and allow the identification to be made under the sole direction of the *pancha* witnesses, the statements of the identifying witnesses would be outside the purview of Section 162.[71]

A statement made by the accused person to the police in the course of investigation is totally inadmissible in evidence as it is barred by Section 162; and It is immaterial whether the statement amounted to a confession or admission. However, the statements falling under Section 32(1) and Section 27, Evidence Act are exceptions to this rule.[72] If the statement is not made *during the course of investigation,* **it may not come within the**

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69. *V.K. Belurkar* v. *State of Maharashtra,* 1975 Cri LJ 517 (Bom); see also, V.A. *Abraham* v. *Supt. of Police,* 1988 Cri LJ 1144 (Ker).

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purview of Section 162, and if it is not hit by Section 25, Evidence Act it can be used in evidence. An anonymous letter was written by the accused to the police officer complaining about the acts of a *chowkidar* who was ultimately murdered by the accused. The statement was held not to be hit by Section 162 and was held to be admissible in evidence as an admission as to the motive, under Section ***xi,*** Evidence Act.[73] Similarly where a letter containing a confession was addressed to a police officer, it was held to be not inadmissible in evidence.[74] But here as the letter was not written to the police officer during the course of investigation, the question as to whether the letter was inadmissible under Section 162 was not considered by the court. However, in a recent decision the Supreme Court has clarified the legal position when it observed:

> [tjhe prohibition relating to the use of a statement made to a police officer during the course of an investigation cannot be set at naught by the police officer not himself recording the statement of a person but having it in the form of communication addressed by the person concerned to the police officer. If a statement made by a person to a police officer in the course of an investigation is inadmissible, except for the purposes mentioned in Section 162, the same would be true of a letter containing narration of facts addressed by a person to a police officer during the course of an investigation. It is not permissible to circumvent the prohibition contained in Section 162 by the investigating officer obtaining a written statement of a person instead of the investigating officer himself recording that statement.[75]

Although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32, Evidence Act in view of the exemption provided by Section 162(2), it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor.[76]

It appears from the Explanation to Section 162 that an omission to state a fact or circumstance in the statement referred to in Section 162(1) may amount to contradiction. However, every omission is not contradiction. An omission can amount to contradiction if it "appears to be significant and otherwise relevant having regard to the context in which such omission occurs". It is not easy to lay down any test or criterion to determine whether an omission is significant "and otherwise relevant". Therefore the Explanation leaves it by saying that "whether any omission amounts to a contradiction in the particular context shall be a question of fact".

The statement can be used for the purpose of contradicting prosecution witness in the manner provided by the second part of Section 145,

73. ***Baleshwar Rai*** v. ***State of Bihar,*** (1964) 1 Cri LJ 564: {1963) 2 SCR 433.
74. ***Sita Ram*** v. ***State of*** ij.P., ***1966*** Cri LJ 1519: AIR 1966 SC 1906.
75. ***Kali Ram*** v. ***State ofH.P.,*** (1973) 2 SCC 808: 1973 SCC (Cri) 1048. 1059: 1974
76. ***Dalip Singh*** v. ***State of Punjab,*** (1979) 4 SCC 332: 1979 SCC (Cri)
968. 970: 1979 Cri LJ
700, 703; see also,

Evidence Act. The statement is not to be used for the purpose of crossexamining a witness within the meaning of the first part of the said section. Such contradiction of the prosecution witness may be done either by the defence or by the prosecution with permission of the court in cases where these witnesses are declared hostile.[77] [78] [79]

While considering what omissions can be used for contradiction, the Supreme Court reviewed the earlier case law on the point. The court thought there were conflicting views: *i)* omissions, unless by necessary implication be deemed to be a part of the statement, cannot be used to contradict the statement made in the witness box; and *it)* they must be in regard to important features of the incident in the statement made before the police. The court felt, the first proposition not only carries out the intention of the legislature but is also in accord with the plain meaning of the words used in the section. The second proposition not only stretches the meaning of the word "statement" to a breaking point, but also introduces an uncertain element, namely, ascertainment of what a particular witness would have stated in the circumstances of a particular case and what the police officer should have recorded. When the section says that the statement is to be used to contradict the subsequent version in the witness box, the proposition brings in, by construction, what he would have stated to the police within the meaning of the word "statement". Such a construction is not permissible.[78] [79]

It is quite obvious from Section 162(1) that *statements not reduced to writing* by the police officer *cannot be used for contradiction.* However, the Supreme Court has taken the position that though a particular statement is not expressly recorded, a statement that can be deemed to be a part of that expressly recorded can be used for contradiction, not because it is an omission strictly so called but because it is deemed to form part of the recorded statement/[3] According to the Supreme Court such a fiction is permissible by construction in the following three cases:

1. when a recital is necessarily implied from the recital or recitals found in the statement; illustration—in the recorded statement before the police the witness states that he saw *A* stabbing B at a particular point of time, but in the witness box he says that he saw *A* and C stabbing *B* at the same point of time; in the statement before the police the word "only" can be implied *i.e.* the witness saw only A stabbing £;
2. a negative aspect of a positive recital in a statement; illustration—in the recorded statement before the police the witness says that a dark

77. For detailed discussion as to the two

78. *Tabsildar Singh* v . *State ofU.P.,* 1959 Cri Lj 123 1, 1244: AlR 1959 SC

79. *Ibid.*

man stabbed h; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and

3. when the statement before the police and that before the court cannot stand together; illustration—the witness says in the recorded statement before the police that *A* after stabbing *B* ran away by a northern lane, but in the court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after stabbing *i.e.* at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true the other must necessarily be false.

The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law.[80]

Significance of material contradictions may not be the same in every case. Ordinarily when the evidence of a witness in court is at variance with what he stated before the police earlier, the contradictions between the statements are valuable material in favour of the accused for the purpose of challenging the reliability of the witness and impeaching his credit.[80 81 82]

However, the abovesaid effect of contradictions is based on the assumption that the police record is honest and faithful. In a case where the police record was deliberately and purposely made to be unfaithful or distorted or loose and inaccurate with a view to favour the accused, the court would not attach the same significance to the contradictions and omissions contained in such tainted record as the court would normally do if the record had been above suspicion. In such a case the interests of justice demand that the court should carefully weigh the evidence given by the witness in court on its own merits only, irrespective of the contradictions which might have been brought on record on behalf of the accused.[80 81 82 83]

Reading over of the police statement to the witness before he enters the witness box does not amount to use of such statement contrary to the prohibition contained in Section 162(1). But the fact of reading over of the statement may affect the probative value of the evidence of the witness. The probative value has to be judged in the circumstances of each case. No hard and fast rule can be laid down that in all such cases the evidence of such witness will be of no value whatsoever.[83]

80. *Ibid,* 1959 Cri Lj 12.44-45.
81. *Baladin* v. *State ofV.P.,* 1956 Cri LJ 545, 352.: AIR 1956 SC 181.
82. *Ibid.*
83. *Nathu* v. *State of Gujarat,* 1978 Cri Lj 448. 459 (Guj) (FB).

An accused could be permitted to refer for cross-examination the statement of a witness recorded under Section 161 in connection with an incident of the night, in which the offence under trial was committed as Section 162 is never intended to curb the right of the accused to contradict a witness with his previous statement.[84 85]

The statements of witnesses under Section 161 are admissible to the limited extent permitted under Section 162(1) proviso and Section 162(2). The court cannot rely on confessions of the accused and case diary statements of witnesses to come to a conclusion on disputed facts in support of the prosecution or the defence.[83]

8.10 Statements not to be obtained by pressure or inducement

Fair investigation requires that the statements made to the police or other authorities in the course of investigation should be true and unbiased. In order that such statements are made without any pressure, fear or inducement, Section 163 provides as follows:

No inducement to be offered

163. {1} No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act, 1872 (1 of 1872).

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will:

Provided that nothing in this sub-section shall affect the provisions of subsection (4) of Section 164.

Considering the import of Section 24, Evidence Act in the present context, it can be said that Section 163(1} lays down an embargo on the investigating authorities using any inducement, threat, or promise to the maker of the statement which might influence his mind and lead him to suppose that thereby he would gain any advantage or avoid any evil in reference to his conduct as disclosed in the proceedings. The guidelines provided by Section 163(1) are applicable not only in respect of a police officer but also in respect of any person in authority.[84 85 86] In this connection it is interesting to note that in a case involving offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 a confessional statement recorded by officers of Department of Internal Revenue who have been conferred with the powers of an officer of a police station under Chapter XII of the Code has been held by the Supreme Court to be admissible for the purpose of examining existence of prima facie case. The court reached this conclusion by declaring that since the hallmark of police—the requirement of

84. ***Surendran*** v. ***State,*** 1944 Cri LJ 464 {Ker).
85. ***Narayanan*** v. ***Krishnan,*** 1981 Cri Lj 563, 566 (Ker); ***State*** v. ***Des Raj,*** 1979 Cri LJ 558, 563 (J&K); ***see also,*** observations in ***State of Kerala v. Ammini,*** 1988 Cri LJ 107 (Ker).
86. ***P. Sirajuddin*** v. ***State of Madras,*** (1970) 1 SCC 595: 1970 SCC (Cri) 2,40: 1971 Cri Lj 52.3.

submitting charge-sheet under Section 173—was not applicable to the officers of the Department of Internal Revenue, the statement given to them are not—they being not police officers—hit by Section 25, Evidence Act. However, the question whether they complied with Section 163 in recording the statement has apparently not been considered.[87] Sub-section {2) is a corollary to the rule contained in sub-section {1). The proviso to sub-section (2) makes it clear that Section 164(4} will have overriding effect. Actually Section 164(2) requires the Magistrate to explain to the person making a confession that he is not bound to make it and that if he does so, it may be used as evidence against him. This provision is in apparent conflict with Section 163(2), and the proviso to Section 163(2) should save it. Reference to Section 164(4) in the proviso appears to be a mistake.

Power of Judicial Magistrate to record confessions and statements **8.11**

The FIR recorded under Section 154 is of great importance, because it is the earliest information given soon after the commission of a cognizable offence before there is time to forget, fabricate or embellish. Similarly, the confession or statement made by an accused person to the police soon after the occurrence would be highly valuable in evidence. However, according to Section 25, Evidence Act no confession made to a police officer is admissible in evidence against the person making it. Also Section 162 of the Code virtually disallows the use of any confessional statement, made to a police officer during the investigation. By and large the police are not as yet considered trustworthy. It is apprehended that any power given to the police to record confessions is more likely to he misused and that the overzealous police officers might, in the apparent exercise of such power, extort or fabricate confessions. Therefore Section 164 provides a special procedure for the recording of confessions by competent Magistrates after ensuring that the confessions are being made freely and voluntarily, and are not made under any pressure or influence. Section 164 is as follows:

164. (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

[88][Provided that **any** confession or statement made under this sub-section **may** also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Recording of confessions and statements

8/. *Raj Kumar Kanval* v. *Union of India,* (1990} 2 SCC 409: 1990 SCC (Cri) 330: 1991 Cri U 9788. *Subs,* by Act 5 of 2009. S. 13 (w.e.f. 3}-12-2009}.

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.]

(i) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate."

(5) Any statement {other than a confession} made under sub-section {1} shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

[89][(5'A)bz) In cases punishable under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, sub-section (1) or sub-section (2) of Section 376, Section 376-A, Section 376-6, Section 376-C, Section 376-0, Section 376-E or Section 509 of the Indian Penal Code {45 of i860}, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police: Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.

(b) A statement recorded under clause *(a)* of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in Section 137 of the Indian Evidence Act, 1872 (1 of 1872} such that the maker of the statement can be

89. *his.* by Act 13 of 2013, $. *i€*>(w.e.f. 3-2-2013},

cross-examined on such statement, without the need for recording the same at the time of trial.]

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

The section deals with the recording of confessions, and other statements which are not confessions. While a confession so recorded can be used as substantive evidence, a non-confessional statement is not substantive evidence. If the maker of a non-confessional statement recorded under this section is called as a witness in the trial, then his earlier statement can be used for corroborating or contradicting his testimony in the court under Section 157 or Section 145, Evidence Act.[90] And the wordings in Section 157 clearly helps the court. The Supreme Court has pointed out that the expressions "at or about the time when the fact took place" in Section 157 should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Section 157.[91]

The mode of recording a confession is not the same as in case of recording a statement. The mode of recording confession is much more elaborate so as to ensure that free and voluntary confessions alone are recorded under the section. The provisions of Section 164 is a safety valve meant to muzzle involuntary confession.[92] It is in this spirit a new proviso has been enacted under Section 164(1) in the following terms with effect from 31 December 2009: "Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence." Thus it now enhances the role of Section 164 as a safety valve.[93] The object of Section 164 read with the "Judges Rules" he. the executive instructions of the High Court, is to find whether the statement sought to be made by an accused is perfectly voluntary or not.[94 95] Therefore the act of recording confession under Section 164 is a solemn act, and in discharging his duties under the section, the Magistrate must take care to see that the requirements of law under Section 164 must be fully satisfied.[96]

An analysis of the section will bring out the following points:

1. A confession or a statement can be recorded only by a Metropolitan Magistrate or a Judicial Magistrate. The proviso to sub-section (1) [90 91 92 93 94 95]

90. *Ramprasad* v. *State of Maharashtra.* (1999) 5 SCC 3°: 1999 SCC (Cri) 651.
91. *State ofT.N.* v. *Sttresh,* (1998) 2 SCC 372.: 1998 SCC (Cri) 751. 76°.
92. *Kuthu Goala* v. *State of Assam,* 1981 Cri LJ 424, 428 (Gau).
93. *Ins.* by Act 5 of 2009 (w.e.f. 31-12-2009).
94. *State of Assam* v. *Rahindra Hath Cuba,* 1982 Cri Lj 216, 226 (Gau).
95. *Kuthu Goala* v. *State of Assam,* 1981 Cri Lj 424, 427 (Gau);
Munshi Soren v. *State of Assam,* 1981 Cri LJ 1408, 1412 (Gau).

makes it clear that a police officer on whom the powers of a Magistrate have been conferred by any law, will not be considered competent to record confession under Section 164. If any Executive Magistrate or any other Magistrate not empowered under sub-section (i) records a confession, the record of the confession cannot be put in evidence, and further no oral evidence of the Magistrate to prove the confession in such a case shall be admissible. Because, when a statute confers a power on certain judicial officers, that power can be exercised only by those officers. No other officer can exercise that power. The object in enacting such a provision is to create a safeguard for the benefit of the accused person.[1] The basic object to entrust the serious business of recording confession upon the judicial officers is that they must exercise their judicial knowledge and wisdom 10 find out whether it is voluntary confession or not.[2]

2. Confessions or statements can be recorded under Section 164 either in the course of an investigation, or at any time afterwards before the commencement of inquiry or trial.[3] Even if the confession is recorded after the commencement of inquiry or trial, it can still be used in evidence; but Section 164 would not relate to such a confession and the same would be recorded by the trial court or the court making the inquiry.[4]

3. Before recording any such confession, the Magistrate is required to explain to the person making the confession that /) he is not bound to make such a confession, and *ii)* if he does so it may be used as evidence against him. These provisions contained in Section 164(2.}, if administered in the proper spirit, are most salutary. They should not degenerate into idle formalities.[5] The section does not mention the form in which the above said warning is to be given by the Magistrate. But one thing is obviously important that the Magistrate should see to it that the warning is brought home to the mind of the person making the confession. The warnings set forth in Section 164 are merely Illustrative and not exhaustive.[6] It is also very necessary that the Magistrate should disclose his identity to such person so as to assure him that he is no longer in the hands of the police.[7] The importance of the abovesaid warning cannot be overemphasised. It

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has been held that if after the warning, the recording of confession is postponed to another day or if the recording continues on another day, a fresh warning is necessary before a confession or part of a confession is recorded on the other day.[8] In the memorandum required to be made by the Magistrate recording the confession, it is necessary under sub-section (4} to mention, inter alia, the fact of giving the abovesaid warning to the person making the confession.

4. Sub-section (z) of Section 164 further enjoins the Magistrate not to record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. For the exercise of jurisdiction to record confession under Section 164, it is a *sine qua non* that the Magistrate must have "reason to believe that the confession is being voluntarily made'[9].[8 9 10]

The following directions are normally followed by magistrates in order to ensure that a confession is made voluntarily:

[a) After giving warnings to the person making a confession under sub-section (z), the Magistrate should give him adequate time to think and reflect.*[9] No hard and fast rule can be made in this connection, but it is of utmost importance that the mind of such person is completely freed from any possible police influence.[8 9 10 11] Normally such person, if coming from police custody, is sent to jail custody at least for a day before his confession is recorded. It may, however, be noted that there is no statutory provision either in Section 164 or elsewhere, or even an executive direction issued by the High Court that there should be an interval of Z4 hours or more between the preliminary questioning of the accused and the recording of his confession. How much time for reflection should be allowed to an accused person before recording his confession, is a question which depends on the circumstances in each case.[12] The object of giving such time for reflection to the accused, is to ensure that he is completely free from police influence.[13]

8. *Kamnihamhi, re,* AIR 1950 Mad 579; *Punt a Mallah* v. *Emperor,* AIR 1946 Pat 169.

9. *Cbandran* v. *State ofT.N.,* (197S) 4 SCC 90: 1978 SCC (Cri) 528, 539: 1978 Cri Lj 1693;

10. *Shankaria* v. *State of Aher Raja Khima* v. *State of Saurashtra,* 1956 Cri LJ 426: AIR 1956 SC 217, 222; *State* v. *Fateh*

11. *Sarwan Singh Rattan Singh* v. *State of Punjab,* 1957 Cri LJ 1014: AIR 1957 SC 637.

1.2. See, *Sidhartb* v. *State of Bibar,* (2005) 12 SCC 545: (200 *6} 1* SCC (Cri) 175.

13. *Shankaria* v. *State of Rajasthan,* (1978) 3 SCC 435: 1978 SCC (Cri)

{<b) Every inquiry must be made from the accused as to the custody from which he was produced and as to the custody to which he was to be consigned and the treatment he had been receiving in such custody in order to ensure that there is no scope for any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the accused's mind.[14 15] If marks of injuries are found on the person of the accused, he should be asked how he received themA

(c) If the accused is handcuffed, the Magistrate should order to remove the handcuffs, and the police and other persons who are likely to have any influence over the accused should be ordered out in order to create free atmosphere.[14 15 16]

(d) The accused should be assured, in plain terms, of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement.[17] As a further safeguard to ensure that the confession is voluntary, sub-section {3) prohibits a remand to police custody of the accused if he expresses his unwillingness to make the confession when produced before the Magistrate; this does not of course mean or imply that remand has to be made if the accused wants to confess.[18] It has been held that after confession the accused, as a matter of rule, should be sent to judicial lock-up and on no account be returned to police custody.[19]

(e) The accused should particularly be asked the reason why he is going to make a statement which would surely go against his self-interest In course of trial and he should further be told in order to remove any lurking suspicion in his mind that even if he contrives subsequently to retract the confession, it will be evidence against him still.[20] The Magistrate's failure to ask why the accused wanted to confess was however held to be a non-compliance of form curable under Section 463.[21]

(f) The Magistrate recording the confession must appreciate his function as one of a judicial officer and he must apply

14. *Gur*
15. *Sarwan Singh Rattan*
16. *Dik*
17. *Gurubaru*
18. joint
19. *Bhagwan*
20. *Gurubaru*
21. *Rebar*

his judicial mind to the task of ascertaining that the statement the accused is going to make is of his own accord and not on account of any influence on him.[22 23] The Magistrate must put questions to the accused in order to ascertain the voluntariness of the confession,[33] and the record of the confession must show that questions were so asked to ascertain voluntariness.[22 23 24] It would be necessary in every case to put the questions prescribed by the High Court Circular, but the question should not be allowed to become a matter of mere mechanical inquiry and no element of casualness should be allowed to creep in. The Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary. The whole object of putting questions to an accused who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise, having reference to the charge against the accused, as mentioned in Section 24, Evidence Act.[35]

(g) A confession must be "perfectly voluntary" otherwise the court should reject it. The term "voluntary" means one who does anything of his own free will. A Magistrate recording confession must make inquisitorial inquiry and make adequate exercise to ascertain the impelling reason of the prisoner to confess his guilt. If he finds that the reason to be well-grounded and the prisoner has a real, genuine and impelling motive to made a clean breast of his crime, he must proceed to record the confession. However if the answers are halting, incoherent and do not appear to be cogent, the recording Magistrate should call a halt.[26]

(h) To adjudge voluntariness, the Magistrate should take note of two basic factors. *Firstly,* the existing mental condition of the prisoner. The Magistrate ought to proceed with the assumption that the prisoner is labouring under mental agony or disorder having arrayed as an accused of a crime. A man in peril undergoing distress and torture, worry and strain is ordinarily

22. *Gurubaru Praja* v. *R.,* (1.950) 51 Cri Lj 72: AIR 1949 Ori 67, 71-72.
23. *B*
24. *Bhola Cope* v. *Emperor,* AIR 1942. Pat 2S3; *Gurubaru Praja* v. R., (1950) 51 Cri Lj 72: AIR T949 Ori 67, 71-72; *Bala Majhi* v.
25. *Ku*
tb
26.

not mentally fit person to make a statement to endanger his life and liberty. The Magistrate must satisfy himself by some objective tests that a mentally disabled person is fit enough to understand the implications of the warnings and to make a fatal statement. *Secondly,* the Magistrate must satisfy the court by documentary or oral evidence that he had fully exercised his judicial mind to get the real motive or the impelling factor which prompted the prisoner to make the confession.[27] [28] {/'} If the prisoner knows how to write, he may be asked to write out his own confessional statement. Thereby the court gets the real version coming from the prisoner himself; it ensures that the prisoner was mentally capable of translating his thoughts into writing as well. His inability to write the confession in his own words, though otherwise capable, would establish that he was mentally incapable of penning his thoughts in writing, when he could do it under ordinary circumstances—This was the view expressed by Lahiri j in the *Kuthu Goala case*[ls].

{/) It is imperative for the Magistrates to explain to the accused his constitutional rights under Article 2,2(1} of the Constitution as well as the provisions of Section 303 of the Code about his right to consult a lawyer before recording his confession.[27] [28] [29] [30] *(k)* It is the constitutional right of every prisoner who is unable to engage a lawyer or secure a legal service on account of poverty, indigence or incommunicado situation to have free legal service. In default of compliance with the obligation by the Magistrate the confession is vitiated as contravening Article

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5. Sub-section (4} requires that a confession shall be recorded in the manner provided in Section 281 for the recording of the examination of an accused person. Accordingly, the whole of the confession, including every question put to the accused and every answer given by him shall be recorded in full. The record shall, if practicable, be in the language in which the accused gave the confession or if that is not practicable, in the language of the court. The record shall be shown or read to the accused, or if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers. The confession so recorded shall be signed by the accused person making the confession.[3]

27. *Ibid.*
28. ***Kuthu***
29. *State of*
30. *Ibid,* 227.
31. *Abdul*

There is no provision in Section 281 for administering oath to an accused. Therefore no oath can he administered to the accused who is making a confessional statement before a Magistrate; and if oath in fact is administered it will be contrary to the provisions of Section 281 and as such the confessional statement would lose its evidentiary value.[32]

Where, however, the confession is recorded by a Metropolitan Magistrate, then in view of Section 164(4) read with Section 281(1), it shall be enough if the Magistrate makes a memorandum of the substance of the confession in the language of the court and signs the same. In practice, the Metropolitan Magistrates prefer to follow the elaborate procedure of questions and answers for the recording of confessions under Section 164. Whatever be the procedure for the recording of the confession, the confession shall be signed by the person making it; and after the confession is recorded, the Magistrate Is required to make a memorandum at the foot of the record as mentioned in sub-section (4} of Section 164.

In the memorandum, it is necessary to mention, inter alia, the fact of giving of the warning that the confession he is making may be used as evidence against him. Further the Rajasthan High Court has held that while recording confession under Section 164(4) there is "no requirement of law* that there should be a note recorded by the Magistrate on the statement itself that he was satisfied as to the voluntary nature of the statement."[33] Further it was held that there is no legal obligation to provide legal aid at this stage.[34]

6. Section 164 does not mention the place and time of the recording of a confession. However it has been held that the Magistrate should record the confession in open court and during court hours.[35]

7. If an accused person desires to make a statement other than a confession, it can be recorded by a Magistrate under sub-section (5). According to that sub-section, any statement other than a confession made to a competent Magistrate by *any person* during the course of the investigation or at any time before the inquiry or trial, can be recorded by the Magistrate in the manner in which evidence is generally recorded.[36] However, the manner of recording such statements can suitably be modified by the Magistrate if he, in the circumstances of the case considers it desirable to do so. The Magistrate can administer oath to the person before recording his statement.

32. *Philips* v. *State of Karnataka,* 1980 Cri Lj 171, 175 (Kant): see also,
33. *State of Rajasthan* v. *Barbara Singh,* 2.000 Cri Lj 2906 (Raj), paras. 22-25.
34. *Ibid,* paras. 28-29.
35. *Hem Raj Devital* v. *State of Ajmer,* 1954 Cri Lj 1313: AIR 1954 SC 462:
36. *See,* Ss. 272--80.

As already mentioned earlier the Criminal Law (Amendment) Act, 2013 requires the Judicial Magistrate to record the statements of victims of sexual offences under Sections 354 to 354-D, 376(2)
(1) , 376-A to 376-E or Section 509 IPC in the manner prescribed in
Section 164(5) [as] soon as the offence is brought to the notice of the police. If the victim making the statement is temporarily as permanently disabled the Magistrate shall take the help of an interpreter or special educator. Moreover, the recording should be videographed. Such statement shall be considered in lieu of examination-in-chief, as specified in Section 137, Evidence Act, 1872.[37] [38]

In a case the prayer of some persons for getting their statements recorded by a Magistrate under Section 164 with a view to help the accused set up a plea of alibi was rejected by the Supreme Court.[3S] The court opined that the Magistrate is under no obligation to record the statements of strange individuals. It reasoned thus:

In the scheme of the above provisions [Ss. 157-175] there is no set or stage at which a Magistrate can take note of a stranger individual approaching him directly with a prayer that his statement may be recorded in connection with some occurrence involving a criminal offence. If a Magistrate is obliged to record the statements of all such persons who approach him the situation would become anomalous and every Magistrate's Court will be further crowded with a number of such intending witnesses brought up at the behest of accused person.[37] [38] [39] A statement of a witness is recorded under Section 164 with a view to pin him down to it. However, such statement cannot be used as substantive evidence. It can only be used for contradicting or corroborating under Sections 145 and 157, Evidence Act, 1872, when the person making the statement gives evidence in court. The evidence of such a witness whose statement is earlier recorded under Section 164 must be approached with caution,[40] because such witness is likely to feel tied to his previous statement given on oath and has but a theoretical freedom to depart from his earlier version. A prosecution for perjury could be the price of that freedom. It is of course, open to the court to accept the evidence of a witness whose statement was recorded under Section 164, but the salient rule of caution must always be borne in mind.[41]

8. The Magistrate recording a confession or statement under Section 164 is required to send the record directly to the Magistrate by whom the

37. *See,* S. *16,*
38. *jogendra*
39. *Ibid,* 276.
40. *Ba*
41. *Balak*
Ram

case is to be inquired into or tried. Such record is admissible in evidence even though the Magistrate making the record is not called as a witness to formally prove it at the trial of accused person. Because, according to Section 80, Evidence Act, 1872, the court is required to presume—that the record is genuine, that any statement as to the circumstances under which it was made are true and that such confession or statement of the accused was duly recorded.

Questions may arise to the legal consequences of non-compliance with the provisions of Section 164. The Magistrate recording the confession may not belong to the class of Magistrates mentioned in Section 164(1}; the person making the confession might not have been cautioned as required by Section 164(2); or the Magistrate might have failed to record the confession or the statement in accordance with Section 164(4) *be.* [not m] the manner provided by Section 281; or the Magistrate might have failed to make a memorandum as required by Section 164(4). Section 463 is designed to cure to some extent the defects and irregularities in the recording of the confession or other statement of the accused under Section 164. Section 463 reads as follows:

> 463. (1) If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under Section 164 or Section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in Section pi of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.
>
> (2) The provisions of this section apply to Courts of appeal, reference and revision.

Non-compliance with provisions of Section 164

According to Section 91, Evidence Act, 1872, if any matter is required by law to be reduced to the form of a document *{viz.*> recording of a confession or a statement under S. 164 CrPC) no evidence shall be given in proof of such matter except the document itself. Therefore when a Magistrate has recorded a confession under Section 164 but has failed to record as required by that section that the provisions of the section were complied with, no evidence can be given to show that such confession was in fact *duly* made to the Magistrate. Section 463, however, lifts this embargo on the admission of such evidence provided: *a)* such non-compliance with Section 164 has not injured the accused in his defence on the merits, and b) he had in fact duly made the statement recorded. The words *"duly* made the statement recorded" are of vital importance. It has now been well-settled that where Magistrate recording a confession under Section 164 neglects

to follow the procedure prescribed by that section;, oral evidence of the confession is totally inadmissible.[42] The object in giving power to a Magistrate to record confessions under Section 164 is that the confession may be proved by the record of it made in the prescribed manner. If proof of the confession by other means is made permissible, the whole purpose of Section 164 including safeguards contained in it for the protection of accused persons, would be rendered nugatory. The Supreme Court has therefore held that Section 164, by necessary implication, prohibits the Magistrate from giving oral evidence of the confession made to him.[43] Section 463 only permits oral evidence to prove that the procedure laid down in Section 164 had actually been followed, where the record, which ought to show that, does not do so.[44] The safeguards provided in Section 164 for the benefit of the accused persons were purposely created by the legislature and it could not have been intended that they might, at the will of the prosecution, be bypassed. That is what would happen if it were held that the operation and effect of Section 463 is that oral evidence of the Magistrate is admissible to prove the confession even though Section 164 is not complied with.[45]

Section 164 does not override Section 29, Evidence Act. In view of the specific provision of Section 29, mere absence of warnings under Section 164 would not make the confession inadmissible, provided the court is satisfied that the accused knew that he was not bound to make the confession and that if he did so it would be used as evidence against him.[46] However, if the Magistrate recording a confession of an accused person produced before him in the course of police investigation, does not, on the face of the record, certify in clear, categorical terms his satisfaction or belief as to voluntary nature of the confession recorded by him, nor testifies orally, as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial.[47]

10. The word "may" in sub-section (1) of Section 164 does not denote that the Magistrate has *full* discretion to record or not to record a confession according to the procedure laid down in Section 164. The principle is that where a power is given to do a certain thing in a

42. *Nazir Ahmad* v. *King*
43. *State of U.P.* v.
44. *Ibid,* see *ulsojotish*
45. *State of U.P.* v.
46. *State* v. *Mitu,* 1977
47. *Chandran* v. *Sta*

certain way the thing must be done in that way or not at all Other methods of performance are necessarily forbidden. The discretion suggested by the word "may"' is only for the purpose of giving true effect to the provisions of Section 164. For instance, it can hardly be doubted that a Magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing mad man, or for any other reason the Magistrate thought it to be incredible or useless for the purposes of justice.[45]

11. Section 164 is applicable to confessions and statements recorded by Magistrates during the course of an investigation or at any time afterwards before the commencement of the inquiry or trial If the confession is recorded by a Magistrate wRen no investigation had begun, the mandatory procedure laid down in Section 164 is not applicable in such a situation. In a case where the accused after committing murder went to a Magistrate and made a confessional statement and the Magistrate recorded the statement and the accused signed it, it was held that though the procedure laid down in Section *164* was not followed, yet as no investigation of crime registered against the accused was in progress, the confession was admissible in evidence.[48 49] There is nothing in the language of Section 164 to enable us to go to the extent of converting a mode of performance of duty of certain Magistrates during a certain period into a disability of all those who may hold magisterial office to give evidence of confessional statements even other than those covered by Section 164.[48 49 50] However, where the accused is induced to make a statement or confession to a person other than a Magistrate or the police merely as a colourable pretence for the purpose of avoiding the letter of the law, such a statement or confession must be held to have been made "in the course of an investigation[77] within the meaning of Sections 162. and 164, and it must be rejected, as in its spirit it is in violation of the provisions of those sections.[51]

It is pertinent to note that while making searches under Section 165 if the occupants permits the police can take photographs of the place.[52]

12. in order to ensure availability of proper evidence in rape cases it is now provided ln Section 164-A *[vide* Code of Criminal Procedure (Amendment) Act, 2005 effective from 23-6-2006] that in case the

48. ***Nazir Ahmad*** v. ***King Emperor,*** (1936; 37 Cri IJ 897: AIR
49.

50. ***Nika Ram*** v. ***State ofH.P.,*** 1972 Cri Lj 204, 210 (H P); see also,
51. *Rao*
Shiv
52. See. ***Veena Rangnekar*** v. ***State,*** 2000 Cri Lj 2543 (Del).

victim of rape or attempted rape is proposed to be examined by a medical expert she should be examined by a registered medical practitioner employed in a hospital run by the government or local authority and in the absence of such an expert, by any other registered medical practitioner with the consent of the victim or of the person competent to give consent on her behalf. The victim shall be sent to the registered medical practitioner within Z4 hours of the commission of offence. The medical practitioner should examine the person and prepare a report giving the name and address of the woman and of the person by whom she is brought, the age of the victim, the description of material taken from the person of the victim for DNA profiling, marks of injury, general mental condition and other material particulars. The report should contain reasons for each conclusion. The time of commencement and completion of examination and the fact whether the consent of the woman or that of the person competent to give consent on her behalf should be recorded in the report.[53]

53. *See,* S. 164-A *inserted* by Act 2.5 of z005, S. 17 (w.e.f. 25-6-2005} which runs as follows: 164-A. *Medical examination of the victim of rape.*—(1} Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2} The registered medical practitioner, ro whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the woman and of the person by whom she was brought;

{ii) the age of the woman;

{Hi) the description of materia! taken from the person of the woman for DNA profiling;

[tv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(t*i) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4} The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6} The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause *{a)* of sub-section (5} of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Police officer to maintain diary of investigation proceedings **8.12**

According to Section 172(1) every investigating police officer is required to enter day by day his proceedings in the investigation in a diary. The purpose is to avoid concoction of evidence or changing chronology to suit investigation. It ensures transparency in police investigation.[54] Such a diary shall set forth the time at which the information reached the investigating officer, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation. [S. 172(1)] The diary is popularly called "case diary", or "special diary". Any criminal court can send for the police officer's diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. [S. 172(2)] It is a document under Section 91 that can be summoned by the court dehors Section 172 A As the honesty, capacity and discretion of the investigating police officer cannot be entirely trusted, it is considered necessary for the protection of the public against criminals, for the vindication of law and for the protection of the accused that the court should have the means of ascertaining what was the information, true, false or misleading, which was obtained from day to day by the police officer who was investigating the case and what were the lines of investigation upon which the police officer acted.[56] Hence it is of utmost importance that the entries in such a diary are made with sufficient promptness, in sufficient detail, mentioning all significant facts, in careful chronological order and with complete objectivity. The haphazard maintenance of the diary would defeat the very purpose for which it is required to be maintained.[57] Where the cases for prosecution and defence are both inadequate, the case diary would help the court to discover for itself the material facts which can be brought to light through examination of witnesses and get at the truth in the interests of justice.[58] It may, however, be noted that though the diary might be useful for getting at the means for elucidating points which need clearing up or for the discovery of relevant evidence, it can never be used as substantive evidence of any fact stated in it. The case diary is not an evidence of any date, fact or statement in the diary.[59] Nor could any entry in it be, even with the defence counsel's concession, used to reach at the

Explanation.—Ycx the purposes of this section, "examination"' and "registered medical practitioner" shall have the same meanings as in Section 53.

54. See, *State* v. *Anil Jacob,* 2.009 Cri LJ 1355 (Bom).
55. *State of Kerala* v. *Baku,* (1999) 4 SCC 621: 1999 SCO (Cri) *611.*
56. *Queen Empress* v. *Mannu.* ILR {1897) 19 All 390 (FB).
57. *Bhagwant Singh* v. *Corntnr. of Police,* (1983) 3 SCC 344: 1983 SCC (Cri) 637, 645: 1983 Cri Lj 1081. Also see, *Jotish Roy* v. *State,* 1982 Cri Lj 269, p. 271 (Ori); *Kebar Singh* v. *State (Delhi Ad?nn.},* (1988} 3 SCC 609: 1988 SCC (Cri) 711.
58. *Priyalal Barman* v. *State,* AIR 1970 A&N 157; *Habeeb Mohammad* v. *State of Hyderabad,* 1954 Cri Lj 538: AIR 1954 SC 51, 60.
59. *Da! Singh* v. *King Emperor,* (1916) 18 Cri Lj 471: AIR 1917 PC 25, 28, 29: *Dikson Mali* v. *Emperor,* {1942) 43 Cri Lj 36: AIR 1942 Pat 90.

motive of the crime.[60] A judge cannot make use of the case diary in his judgement and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in the diary.[61] In the course of taking aid from a police diary, a criminal court is not justified in reading confessions and statements found therein and using such material to disbelieve the prosecution case or the defence case.[62]

Section 172(3) imposes a restriction on the use of case diary by the accused person. It says:

> 172. {3} Neither the accused nor his agents shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act (1 of 1872), shall apply.

Diary of proceedings m investigation

In the absence of such a restriction on the accused person, the informer conveying information to the police would be deterred and that would hamper speedy investigation.[63] If the accused were entitled to see the case diary, the investigating police officer might not record matters injurious to the prosecution. However, the accused person is allowed to use the case diary for cross-examination of the police officer who made it under two circumstances: 1) If the police officer, while giving evidence, refreshes his memory by referring to the case diary (and this is permissible under S. 159, Evidence Act) the accused is entitled to see the relevant entries in the diary and may use the same for cross-examining the police officer as provided by Section x6i, Evidence Act; or 2) if the court uses the diary for the purpose of contradicting such police officer In accordance with the provisions of Section 145, Evidence Act, then the accused can have the right to inspect the relevant portions of the diary.

In this connection it is pertinent to note that the court is not bound to compel the police witness to look at the diary in order to refresh his memory nor is the accused entitled to insist that he should do so.

Referring to the vagueness as to the nature of the diary and some states describing it as a "special diary" or "case diary" and others referring to them as "general diary" signifying some differences in meaning, the Supreme Court opined that a legislative change is necessary providing for framing of appropriate and uniform regulations regarding the maintenance of diaries by the police for the purpose contemplated by Section 172 vis-a-vis the other sections such as Section 167.[64]

60.
61. *Habeeb*
62. *Naraya*
63. 4isr Report,
64.

It may be noted that even in the abovementioned two circumstances the accused is not allowed the wholesale inspection of the entire case diary. And it may also be noted that the provision has been held to be constitutional.[6*,*]

He can only inspect those portions of the diary as used by the police officer or the court as mentioned above, and such other portions of the diary as the court considers necessary for the full understanding of the portions actually used/[6]

In a case where the entire case diary maintained by the police was made available to the accused the Supreme Court remarked, with disapproval, that the learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of the Code, [65 66 67 68] The court observed that

> [tjhe police officer who is conducting the investigation may come across series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused.[6S]

If the case diary is not maintained as required by Section 172, that in itself may not vitiate the trial; but It would expose the evidence of the investigating police officer to adverse criticism, and might diminish the value of his evidence.[69]

Procedure when investigation cannot be completed in 24 hours

It has been already seen that a police officer cannot detain an accused person arrested without a warrant for more than 24 hours.[70] If the police officer considers it necessary to detain such accused person for a longer period for the purposes of investigation, he can do so only after obtaining a special order of a Magistrate under Section 167. That section reads as follows:

classification in *State (NCT of Delhi)* v. *Ravi Kant Sharma,* (2007) 2 SCC 764: (2007) 1 SCC (Cri) 640: 2007 Cri Lj 1674.

65. *Subhash Chandra* v. *Union of India,* 1988 Cri Lj 1077 (Raj). See also, *Mukund La!* v. *Union of India,* 1989 Supp (r) SCC 622: 1989 SCC (Cri) 606: 1989 Cri LJ 872; *CBl* v. *Mahinder S'mgh,*
66. *Queen Empress* v. *Mannu,* ILR (1897) 19 All 390, 405 (FB).
67. *Sidharth* v. *State of Bihar,* {2003) 1.2 SCC 545: (2006) 1: SCC (Cri) 175.
68. *Ibid,* para. 27. *See,* observation in *State (NCT of Delhi)* v. *Ravi Kant Shanna,* (2007) 2 SCC 764: (2007} 1 SCC (Cri) 640: 2007
69. *Zahiruddin* v. *Emperor,* (1947) 48 Cri Lj 679: (1946-47) 74 IA 80: AIR 1947 PC 75, 77; see also, *Niranfan Singh* v. *State of*
70. *See supra,* S. 57, para. *6.$(d).*

Procedure when investigation cannot be completed in twenty-four hours

167. {1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the
police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a
Magistrate having such jurisdiction:

Provided that—

[71] *{{a}* the Magistrate may authorise the detention of the accused person, oth-. erwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

{it} sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;][71 72 73] *\c)* no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[A]*[Explanation I.*—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a}, the accused shall be detained in custody so long as he does not furnish bail.]

71. *Subs,* by the Code of Criminal Procedure (Amendment) Act, 1978,
72. Portion after "before him" came to be inserted by Act 5 of 2.009
73. Original 0x pin, I *renumbered* as Ex pin. II and Expln. I *added* by Code of Criminal Procedure (Amendment) Act, 1978, 7. 13.

[74][*Explanation IL*—If any question arises whether an accused person was produced before the Magistrate as required under clause *(b),* the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:]

[A][Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.]

[7<5][(2-A) Notwithstanding anything contained in sub-section (i) or subsection (a), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on w-hom the powers of a Judicial Magistrate, or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph *(a)* of the proviso to sub-section (z):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.]

(3} A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it to the Chief judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) "Where any order stopping further investigation into an offence has [74 75 76]

74. *Subs.* by Act 5 of 2.009, S. 14 (w.e.f.

75. *Ins.* by Act 5 of 2009, S. *14* (w.e.f.

76. *Ins.* by Act 45 of 1978, S. 13.

an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

The detention in police custody is generally disfavoured by law, and such detention can be allowed only in special circumstances for reasons judicially scrutinised, and for such limited periods as the necessities of the case may require.[77 78] The scheme of the section is intended to protect the accused from unscrupulous police officer. The object is to see that persons arrested by the police are brought before a Magistrate with the least possible delay so that the Magistrate could decide whether the persons produced should further be kept in police custody and also to allow them to make such representations as they may wish to make.[75] When the arrested person is produced before the Magistrate it is his duty either to release him on bail or to remand him. The Bihar High Court has ruled that remand made by the Magistrate would continue till the trial is over.[79 80] As observed by the Supreme Court, the provision inhibiting detention without remand is a very healthy provision which enables the magistrates to keep check over the police investigation. The Supreme Court deprecates illegal detention and has awarded a compensation of [A]20,000 for the illegal detention of a person by the police in DG *& IG of Police* v. *Prem Sagar*[SQ]. According to the Supreme Court, it is necessary that the Magistrates should try to enforce this requirement and where it is found disobeyed come down heavily upon the policed[1]

An analysis of Section 167 will bring out the following points:

1. Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 57,[77 78 79 80 " 82] and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation (if he is not below the rank of sub-inspector) shall forthwith transmit a copy of the entries in the case diary to the nearest Judicial Magistrate, and shall also at the same time forward the accused to such Magistrate. [S. 167(1)] The words "nearest judicial Magistrate" suggest that the Magistrate need not be one having jurisdiction to try the case. But it has been held that in the

77. ***Jai Singh*** v.
78. ***Cha daya*** m
79. *Hari Cum*
80. ***DG & IG of*** Sl. ***Khatri (z)*** v.
82, For the text of

absence of any difficulties like long distance etc. the police should approach for the purposes of remand a Magistrate having jurisdiction to try the case.[85] It has now been provided further that where a Judicial Magistrate is not available, the copy of the entries in the case diary as well as the accused person as mentioned above may be transmitted to the nearest Executive Magistrate on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred. [S. xdylz-A)] Where the accusation or information is not believed to be well-founded, or where that investigation can be completed within 24 hours, Section 167, is not to be invoked. In such contingencies the procedure provided by Section 169 or Section 170, as the case may be, will have to be followed.[84]

2. The judicial Magistrate to whom an accused person is so forwarded may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding 15 days in the whole. If the Judicial Magistrate before whom the accused is so forwarded has no jurisdiction to try the case or commit it for trial, and considers further detention (that is, beyond the total period of 15 days) unnecessary, he may order the accused to be forwarded to a Judicial Magistrate having jurisdiction. [S. 167(2)]

If the accused is produced before an Executive Magistrate as mentioned in (1) above, such Executive Magistrate may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate. [S. 167^-A)] Before the expiry of the said period, the Executive Magistrate is required to transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the case diary which was transmitted to him by the police as abovementioned. [proviso to S. 167(2-A)] If the period of detention so authorised expires and no further detention of the accused person is authorised by a competent Judicial Magistrate, the accused person shall be released on bail. [S. 167(2-A)]

The nature of the custody can be altered from judicial custody to police custody and vice versa during the first period of 15 days mentioned in Section 167(2). [or seven days mentioned in S. 167(2- A)] After 15 days mentioned in Section 167(2) the accused can only be kept in judicial custody or any other custody as ordered by the Magistrate, but not the custody of the police.[85]

. *Bal Krishna* v. *Emperor,* (1932) 33 Cri Lj 1S0, 182: AIR 1931 Lab 99. .

See infra, para. 8.14.

S5. *State {Delhi Admn.)* v. *Qharam Pal,* 1982 Cri Lj 1103, m0 (Del).

In *CBI* v. *Anupam J. Kulkarnf*[6], it has been reiterated that police remand should not be resorted to after 15 days of arrest. Custody after the expiry of first 15 days can only be judicial custody during the rest of the period of 90 days or 60 days and that police custody if found necessary can be ordered only during the first period of 15 days. However, if the accused is involved in another case he can be rearrested and remanded to police custody with the permission of the Magistrate.

Non-availability of police for escort duty was held to constitute a valid ground for extending the period of remand of an accused under Section 167(a).[86] [87]

3. It has been specifically provided that no Magistrate shall authorise detention in any custody under Section 167 unless the accused is produced before him. [proviso {b} to S. 167(a)] The object of requiring the accused to be produced before the Magistrate is to enable the Magistrate to decide judicially whether remand is necessary and also to enable the accused to make any representation to the Magistrate to controvert the grounds on which the police officer has asked for remand.[88] In order to facilitate the proof of the fact that the accused was produced before the Magistrate as required by Section 167, the Magistrate may obtain signature of the accused on the order authorising detention. The Explanation II appended to the proviso to Section 167(2) provides that if any question arises whether an accused person was produced before the Magistrate as required under para, *(b)* of the proviso, the production of the accused person may be proved by his signature on the order authorising detention. The Patna High Court opined that though physical production of the accused is desirable, yet failure to do so would not *per se* vitiate the order of remand if the circumstances for non-production were beyond the control of the prosecution or the police.[89] This view seems to run counter to the statutory provision [S. 167] and the Supreme Court's direction in *Ramesb Kumar Singh* v. *State of Bihar*[90].

When an accused detained in custody of a court is sent outside its jurisdiction and thus there being no production in that court, such non-production Is neither illegal nor unauthorised violating

86. (1992.] 3 SCC 141: 1992
87. *Kurra*
88. *Bal Krishn a* v.
89. *Ramesb Kumar Ravi v. State of*
90. 1987 Supp

Article 22(2) and 21 of the Constitution and also Sections 167(2) and 390(2) of the Code.[91]

The Magistrate has to exercise his judicial mind while deciding whether or not the detention of the accused in any custody is necessary.[92] The Magistrate should consider all available materials including the copy of the case diary before authorising detention. The order of detention is not to be passed mechanically as a routine order on the request of the police for remand.[93]

In *Mantoo Majumdar* v. *State of Bihar*[94], the Supreme Court ordered the release of the petitioners on their own bond without sureties subject to the legal proceedings that the State may initiate if warranted. The court found that the undertrial prisoners were imprisoned for more than seven years without any investigation or laying any challan. The Magistrates had been authorising detention mechanically, thus violating Article 21 of the Constitution and Section 167(2) of the Code. After ordering the release of the petitioners (undertrial prisoners) the court called for undertaking a survey of prisoners to find out whether illegal custody had become large-scale phenomenon.

4. The Magistrate has full discretion to order detention in police custody or judicial custody.[95] The Magistrate can remand the accused person even to military, naval or air force custody if such accused person is subject to military, naval or air force law. However, no Magistrate of the second class, not specially empowered in this behalf by High Court, can authorise detention of the accused in the custody of the police; [para, *(c)* of the proviso to S. 167(2)] nor can the accused be remanded to police custody after the expiry of 15 days as mentioned in proviso *(a)* to Section 167(a).[96] But this limit is not applicable when there is a series of different cases requiring investigation against the same accused.[97] The observation of the Punjab and Haryana High Court is pertinent: "We see no inflexible bar against a person in custody with regard to the investigation of a particular offence being either re-arrested for the purpose of the investigation of an altogether different offence."[98]

91. *Ramchander Non:a* v. *State of Bihar,* 1985 Cri Lj 894 (Pat).

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93. *Madhu Lhnaye, re,* {1969) 1 SCC 292: 1969 Cri Lj 1440.
94. (1980) 2 SCC 406.
95. M.R. *Yenkatmman, re,* (1948) 49 Cri Lj 41: AIR 1948 Mad 100.
96. *State (Delhi Admn.)* v. *Dhararn PaL* 1982 Cri LJ 1105 (Del); *CBI* v. *A*

97. S. *Harsimran Singh* v. *State of Punjab,* 1984 Cri LJ 253 (P&H),
98. *Ibid.*

5. Where a decision is to be taken after exercising judicial discretion, it is generally desirable to record reasons for the decision. Particularly where the detention in the custody of the police is ordered by a Judicial Magistrate, he is specifically required to record reasons for doing so. [S. 167(3)] In case of Executive Magistrate authorising detention of the accused person, it has been clearly and specifically provided that such a Magistrate can authorise detention "for reasons to be recorded in writing", *[see,* S. 167(2^]

6. If the Judicial Magistrate is satisfied that for the purpose of investigation the accused person be detained beyond the period of 15 days mentioned above, he can authorise further detention of the accused. But in such a case: 1) the detention shall be in custody other than that of the police, and 2) the total period of detention [including the abovementioned period of 15 days and the period during which the detention was authorised by an Executive Magistrate under Section 167(2-A)] shall not exceed *a)* 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years and *b) 60* days where the investigation relates to any other offence, [para, *(a)* of proviso to S. 167(2)] It has been clarified that in offences where the sentence up to 10 years' imprisonment is provided, the challan has to be filed within 60 days and in cases sentence period is not less than 10 years, challan has to be filed within 90 days.[1] It has been ruled by the Supreme Court that the period for the offence under Section 304-B IPC which is punishable with imprisonment for a period between seven years and life imprisonment is 90 days as the offence is "punishable" with life imprisonment.[2]

The prescribed statutory period of 90 days or of 60 days as mentioned in proviso *(a)* to Section 167(2) is to be computed from the date the Magistrate authorises detention of an accused person. If the Magistrate authorises detention on the very date of arrest of an accused person, then the period of detention of 90 days or 60 days is to be computed from the date of his arrest.[3] But this has since been clarified in *State of M.P,* v. *Rustam*[4]. In this case the accused was sent to judicial custody on 3 September 1993. Challan was submitted by police on 2 December 1993. The accused claimed compulsive

t. *Om Parhash Gabbar* v. *State of Punjab,* 1997 Cri LJ 2,974 (P&H).

2. *Bhupinder Singh v.Jarnail Singh,* {2006} 6 SCC 277: (2006} 3 SCC (Cri) 101.

3. *jai Singh* v. *State of Haryana,* 19So Cri LJ 1229, 1231 (P&H); see also, *L.R. Chawla* v. *Murari,* 1976 Cri Lj 212 (Del); *Tarsem Kumar* v. *State,* 1975 Cri Lj 1303 (Dei); *fagdish* v. *State of MSP.,* 1984 Cri Lj 79 (MP); *Chaganti Satyanarayana* v. *State of A.P.,* (1986} 3 SCC J.41: 1986 SCC (Cri) 321 and the Supreme Court's observations therein.

4. *State of MSP.* v. *Rustam,* 1995 Supp (3) SCC 221: 1995 SCC (Cri) 830; also see, *Feroz* v. *Stale,* 1986 Cri Lj 439 (Pat); *Jagdish* v. *State of M.P.*, 1984 Cri Lj 79 {MP}.

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bail and the High Court granted it. The Supreme Court reversed the High Court ruling and observed:

> We find that the High Court was in error—both in the matter of computation of the period of 90 days prescribed as also in applying the principle of compulsive bail on entertaining a petition after the challan was filed as the so-called "indefeasible right[7]1 of the accused, in our view, stood defeated by efflux of time.[5 6 7 8]

The court explained that clear 90 days have to expire before the right begins. And here, in computing the period of 90 days one of the days on either side *{i.e.* 4-9-1993 and 31-12-1993) has to be excluded as required under Sections 9 and 10, General Clauses Act.[6 7 8] In this view the challan was filed within 90 days and hence there was no question of granting bail by default.

It may be pertinent to note that the Supreme Court has held that obtaining sanction for prosecution is not relevant for the application of proviso to Section 167(2)/

7. On the expiry of the said period of 90 days, or 60 days, as the case may be, the accused person shall be released on bail If he is prepared to and does furnish bail; it is not that he has to make a formal written application for exercising the right of being released on bailT If he intimates the court orally or *in* writing, the court cannot refuse to pass an order directing his release on bail for want of a written application. It has been held that after filing charge-sheet the Magistrate is not competent to grant bail under the proviso to Section 167(2).[9] But if the charge sheet is not filed, right under proviso to Section 167(2) would arise.[10] If the charge-sheet is filed it ceases. This right does not revive only because a further investigation remains pending within the meaning of Section 173(8). As regards the power of the court to remand the accused at different stages, the Supreme Court ruled thus: The power of a court to direct remand of an accused either in terms of sub-section (2) of Section 167 of the Code or sub-section (2) of Section 309 thereof will depend on the stages of the trial. Whereas

5. *State ofM.P.* v. *Rustam,* 1995 Supp {3} SCC 221: 1995 SCC (Cri) 830.
6. *Ibid,* 831.
7. See, *Sur*
8. *Shankar* v. *State of T.N.,* 1991 Cri Lj 1745 (Had).
9. *S hard ulbh ai*
10. See, *Din esb Dah*

sub-section *(z)* of Section 167 of the Code would be attracted in a case where cognizance has not been taken, sub-section (2) of Section 309 of the Code would be attracted only after cognizance has been taken.[11] [12] Indeed as held by the Supreme Court in the *Hussainara Khatoon (j) case.*[11] [12] it is the duty of the Magistrate to inform the accused that he has a right to be released on bail under the proviso.[13] Further the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the Magistrate as also when he is remanded from time to time,[14] The Supreme Court has ruled that the court's failure to inform the accused of his right to free legal aid in case of his being indigent, would vitiate the trial and result in the acquittal of the accused.[15]

8. Every person so released on bail under Section 167(2) shall be deemed to be so released under the provisions of Chapter XXXIII of the Code (dealing with bail and bonds) for the purposes of that Chapter, [para. *(a)* of proviso to S. 167(2)] This provision is applicable irrespective of the fact that the offence of which the detained person is accused of is non-bailable or the case is such that bail cannot be granted according to the provisions of Chapter XXXIII of the Code dealing with bail and bonds. But once the bail is granted under this provision, the provisions of Chapter XXXIII have been made applicable for subsequent dealing with bail matters. For instance, the court can cancel the bail under Section 437(5) as if the bail was originally granted under Chapter XXXIII of the Code.[16] The bail under Section 167(2) has the same incidents as the bail granted under Chapter XXXIII of the Code and is accordingly to remain valid till it is cancelled and the cancellation of a bail can only be on the grounds known to law and the receipt of the charge-sheet in court by itself can be no ground for cancellation of the bail.[17] Once the bail is granted under

11. *Ibid,* 4S.
12. *Hussai*
13. *U m*
14. *Kh atr*
15. *Suk Das* v,
16. *Kapoor*
17. *Ba shi r* v. *St*

this provision, the provisions of Chapter XXXIII have been made applicable for subsequent dealing with bail matters, like cancellation of bail etc. Therefore, bail under Section 167(2) has the same incidents as the bail granted under Chapter XXXIII of the Code and is accordingly valid till it is cancelled and cancellation of a bail can only be on the grounds known to law and the receipt of charge-sheet in court by itself can be no ground for cancellation of bail.[18] Also, the fact that before an order was passed under Section 167(2) the bail petitions of the accused were dismissed is not relevant for the purpose of taking action (of cancelling bail) under Section 437(5).[19]

The mere lapse of the abovementioned period of 90 days or 60 days will not entitle the accused to be released forthwith. It has been made clear by Explanation I to Section 167(2) that notwithstanding the expiry of the specified period the accused shall be detained in custody so long as he does not furnish bail. It has also been held that detention beyond 90 days or 60 days as the case may be, would not be a ground for bail.[20] Nor can the accused claim bail under this provision after the submission of police report beyond the respective prescribed periods.[21]

To be within the time limit the police has to submit its complete report. Unless the court takes the report on record and keeps it on its file or its examination for deciding whether to take cognizance or not, it cannot be said that a police report is filed as contemplated order Section 173(2).[22]

p. Any Magistrate other than the Chief Judicial Magistrate making such order of detention under Section 167(2) shall forward a copy

(MP); *Rajnikanl jiuanlal* v. *Intelligence Officer, Narcotic Control bureau,* (1989) 3 SCO 532: 19S9 SCC (Cri) 612: 1990 Cri LJ 62; *B.S. Raw at* v. *Leidomann Heinrich,* 1991 Cri Ij 552 (Bom). But see, *Prahlad* v. *State of Maharashtra,* 1991 Cri LJ 1537 (Bom) arguing that *Rajnikant* was decided prior to the amendment of NDPS Action 9-1-1989 and that proviso to S. 167(2) not ipso facto be extended to bail under S. 37 NDPS Act. The overriding effect of this provision has been upheld by the Supreme Court in *Narcotics Control Bureau* v. *Kishan Lai,*

18. *Aslam Babalal Desai* v. *State of Maharashtra,* (1992) 4 SCC 272: 1992 SCC (Cri) 870; *Mohd-. Iqbal Madar Sheikh* v. *State of Maharashtra,* (1996) 1 SCC 722: 1996 SCC (Cri) 202 relying on
19. *Bashir* v. *Sta te of Haryana,* (1977) 4 SCC 410: 1C77 SCC (Cri) 608, 612: 197S Cri Lj 173, 176. Also *see, Jagdish* v. *State of M.P.,*
20. *Mah esh Cband* v. Sta *te of Rajasthan,* 1985 Cri Lj 301 (Raj). See also, *Joginder Singh* v. *State of Punjab,* 1985 Cri Lj 440 (S&H).
21. *Nawa! Salmi* v. *State of Bihar,* 1989 Cri Lj 733 (Sat); *Surajmal Kanaiyalal Son;* v. *State of Gujarat,* 1989 Cri LJ 1678 (Guj). *Also see,* cases under *supra,* note 9; *State of M.P.* v. *Rustam,* 1995 Supp (3) SCC 221: 1995 SCC (Cri) 830; *Bipm Shantilal Panchal*
22. *Matcbu mari China Venkatarbbdy* v. *State of A.*. P., 1994 Cri Lj 257 (AS); *Doraiv. Karnataka,* 1994 Cri Lj 2987 (Kant); *Sharadchandra Vinayak Dongre* v. *State of Maharashtra,* 1991

of his order, with his reasons for making it, to the Chief Judicial Magistrate. [S. 167(4)] This emphasises the need for recording reasons for the order detaining the accused person in any custody. It also enables the Chief Judicial Magistrate to exercise control in such matters in his supervisory capacity.

10. If the accused has not been arrested by the police but has voluntarily surrendered to judicial custody, the provisions of Section 167 authorising detention of the accused in police custody or other custody within the prescribed time limits are not applicable. Because in such a case, the accused is not "forwarded" by the police to the Magistrate according to the wording of Section 167(2).^

11. Protracted investigations would generally lead to the accused persons being kept in detention on remand for very long periods causing hardship and misery to such undertrial prisoners and their families. The stringent provisions of Section 167 as mentioned above are designed to control the malady of protracted investigations. More drastic measure has been provided in this connection in respect of less serious offences *i.e.* in respect of summons cases.

If in any case triable by a Magistrate as a summons case,[23] [24] [25] the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary. [S. 167(5)] A warrant case, if tried before a Special Judge in a summary way turns to be a summons case within the meaning of Section 167(5).^ The investigation of a summons case beyond the period of six months from the date of arrest of accused can be continued only if the investigating officer satisfies the Magistrate that "for special reasons" and in "the interests of justice" such continuation of the investigation beyond the period of six months is necessary. This satisfaction of Magistrate must be made before the expiry of the period of six months. In the absence of such satisfaction, the Magistrate is bound to stop further investigation and the continuation of the investigation beyond the period of six months in contravention of law is illegal and the cognizance of offence taken by the Magistrate thereafter is bad in law and the subsequent proceeding is without jurisdiction.[26] The accused is not required to raise any objection as

23. *State*
24. For
25.
26. *See,* obse rvati

the obligation is upon the Magistrate to stop further investigation.[27] Failure on the part of the court to stop the investigation on the expiry of six months as provided under Section 167(5) will not ipso facto be deemed to be an Implied permission by the court to the investigating officer to continue the investigation beyond the prescribed period as such a continuation could be permitted by the court only for special reasons and in the interests of justice.[28]

The decisions rendered by various High Courts indicate that an investigation beyond the period of six months may not necessarily vitiate the proceedings. While the Bombay High Court held that non-stopping of investigation would be only a curable error,[29] the Andhra Pradesh High Court has ruled that the Magistrate cannot order the police not to submit report after six months.[30] It has also ruled that the Magistrate is entitled to ignore the investigation made by the police beyond six months and confine the case with regard to the investigation that took place within six months.[31] The Punjab and Haryana High Court has held that the Magistrate is not obliged to hear the accused before granting further time for investigation.[32] This is in contrast to the requirement laid down by the Supreme Court that before the investigation is dropped the complainant should be heard.[33] It has been held by the Calcutta High Court that Section 167(5) will not be applicable to an accused who had surrendered before the Magistrate.[34]

If the Magistrate orders the investigations to be stopped as mentioned above, but the Sessions Judge is satisfied, on the application made to him or otherwise, that further investigation into the offence ought to be made, he (he. the Sessions Judge) may vacate the order made by the Magistrate and direct further Investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify. [S. 167(6)] This sub-section (6)

27. *Jay Sankar Jha* v. *State,* 19S2 Cri Lj 744. 746 {Cal): see also,
Ba
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28. *State*
v.J
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9. *Stat2 ofMaharashtra* v. P.C. *Tatyaji,* 1986 Cri Lj 332 {Bom}.

o. *Public Prosecutor,* v, *B. Anjaneyulu,* 1986 Cri Lj 1456 (AP).

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32. *Rovinderpal Singh* v, U7) *Chandigarh,* 1986 CriLj 1371 (P&H).

33.
Se

34. *Sushil Kumar Dey* v. *State ofW.B.,* 1987 Cri LJ 1571 {Cal}.

empowers the Sessions judge to direct further investigation on his own satisfaction on an application filed before him, notwithstanding the fact that such application was not earlier filed before the Magistrate. The power given under this sub-section (6) is intended to be exercised by the Sessions Judge as a court of original jurisdiction. This necessarily means that the Sessions judge was required to consider the grounds raised in the application to satisfy himself whether further investigation should be made into the offence and give his own reasons for acceptance or rejection of such grounds.[35] The question whether the court should have the power to order further investigation was answered in the affirmative by the Delhi High Court as restricting the powders of the court might adversely affect criminal justice administration.[36]

In spite of these elaborate procedures designed to have efficient investigation, the situation has not improved. The unsatisfactory investigations conducted by the local police came to be criticised by the courts in some cases[37]. Demands for CBI inquiries were made in some other cases.[38] In a case the court awarded compensation to the accused who were tortured to extract confessions. In yet another case the wife of accused was asked to compensate some political leaders against whom she made some false allegations of murder and demanded CBI inquiry.[39]

8.14 Procedure to be followed on completion of investigation

(a) Release of accused when evidence is deficient.—If upon investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial. [S. 169]

On completion of investigation the police officer is required to send a report to a competent Magistrate under Section 173. In case the Magistrate disagrees with the police and considers the evidence adequate to put the accused person on trial, the bond taken under Section 169 for appearance before the Magistrate would be quite relevant and useful. The police can carry on the investigation even after the release of the accused person

35. *Supt. &*
36. *Rajneesh*
37. *Ram*
38. *Munir A lam* v.
39. *Bo9mayil* v.

under Section 169, and if sufficient evidence against the accused is found, submit a report under Section 173 and get the person re-arrested.

(b) Cases to be sent to Magistrate when evidence is sufficient.—(1) If, upon investigation, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground to justify the forwarding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or if the offence is bailable and the accused is able to give security shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate. [S. 170(1)]

(2) When such police officer forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the facts and circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused. [S. 170(2)]

(3) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

It may be noted that no complainant or witness on his way to any court shall be required to accompany a police officer, or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond. However, if any complainant or witness refuses to attend or to execute a bond as directed by the abovementioned provisions of Section 170, the police officer may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond or until the hearing of the case is completed. [S. 171]

(c) Report of police officer on completion of investigation.—(1) As soon as the investigation is completed a report which is commonly called as "charge-sheet" or "challan" is to be submitted to the Magistrate having jurisdiction. The necessity of completing the investigation expeditiously is emphasised by giving a general direction that every investigation shall be completed without unnecessary delay. [S. 173(1)]

(2) As soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating:

it) the names of the parties;

(n) the nature of the information;

{in} the names of the persons who appear to be acquainted with the circumstances of the case;

[iv] whether any offence appears to have been committed and if so, by whom;

(id whether the accused has been arrested;

{vi) whether he has been released on his bond and, if so, whether with or without sureties;

{mi} whether he has been forwarded in custody under Section 170. [S. 173(2)!/)]

Submission of this report is part of investigation.[40]

(3) Where a superior officer of the police has been appointed under Section 158,[41] [42] the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation. [s. 173(3)]

(4) The police officer submitting the report is also required to communicate, in the manner prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given. [S. i73(z}(//)]

(5) When the report is in respect of a case to which Section 170 applies *{i.e.* a case in respect of which there is sufficient evidence for sending the accused person to a Magistrate), the police officer shall forward to the Magistrate along with the report: *a)* all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation; *b)* the statements recorded under Section 161 of ail the persons whom the prosecution proposes to examine as its witnesses. [S. 173(5)]

So long as a police report is not filed under Section 173(2) investigation remains pending. It, however, does not preclude an investigation officer from carrying on further investigation despite filing a police report in terms of Section 173(8).^ And the second report would be treated as continuation of the first investigation report.[43]

The investigation of an offence cannot be considered to be inconclusive merely for the reason that the investigating officer, when he submitted

40. See. *Cbittaranjan Mirdha* v. *Duhil Glosb,* (2009} *6* SCC 661: (2009} 3 SCC (Cri) 303; 2009 Cri Lj 3430. It has also been held that
41. See *supra,* par a. 8.6(2}.
42. See, *Dinesh Dalmia* v. *CBJ,* (2007} 8 SCC 770: (200S) 1 SCC (Cri) 36: 200S Cri Lj 337. Also see, *Ramachandran* v. *R. JJdhayakttmarf*
43. *See,* discussions in the *Vipul Shital Prasad Agarival* v. *State of Gujarat,* (2013) *1* SCC

his report in terms of Section 173(2.) to the Magistrate, still awaited the reports of the experts or by some chance, either inadvertently or by design, he failed to append to the police report such documents or statements under Section 161, although these were available with him when he submitted the police report to the Magistrate.[44]

If the police officer is of opinion that any part of such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential In the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.
[S. 173(h)]

In a case where the State handwriting expert had based his opinion and the reasons for his conclusions after perusing the enlarged photographs of the handwriting and as the enlarged photographs were found necessary to aid the accused and also the court for coming to the proper conclusion about the handwriting, it was held that the enlarged photographs would be held to be documents on which the prosecution proposed to rely within the meaning of Section 173(5).[45]

In all proceedings instituted on a police report the Magistrate is required by Section 207 to furnish to the accused copies of documents mentioned in that section, including those of the documents mentioned in Section 173(5), ***supra.*** To claim documents within the purview of scope of Sections 207, 243 read with Section 173 in its entirety and powers of the court under Section 91 to summon documents provides precepts which will govern the rights of the accused to claim copies of the documents which the prosecution has collected and upon which they rely.[46] For the sake of convenience, it has been provided that where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in Section 173(5). [S. 173(7)] Taking into account the purpose of Section 173(5), ^ i[n a] case, the copies of the relevant records made from the original by mechanical processes are produced in court for reference and the necessary copies are supplied to the accused by the police, there would be substantial compliance of Section 173(5). No doubt it is open to the court even in such cases to insist that the original recorded statements should be produced. But Section 173(5) does not confer a right on the accused to insist on production of the originals unless prejudice is made out.[47]

44.

45. ***P.L. Shah*** v. ***State of Gujarat.*** 1982 Cri Lj 763 (Guj).
4
6
47 ***State of Kerala*** v. ***Raju,*** 1982 Cri Lj 304 (Ker).

(d) Magisterial proceedings on police report.—After the completion of the investigation, it is for the investigating police officer to form an opinion as to whether or not there is a case to place the accused before the Magistrate for trial. He would then follow the procedure laid down in Section 169 or Section 170 as the case may be, and submit a report under Section 173. The Magistrate receiving the report has no power to direct the police to submit a particular kind of report;[48] if he considers the conclusion reached by the police officer as incorrect, he may direct the police officer to make further investigation under Section 156(3), he may or may not take cognizance of the offence disagreeing with the police, but he cannot compel the police officer to submit a charge-sheet so as to accord with his opinion.[49] The police report also need not accord with the version of the complainant.[50] No authority can straightway direct the police officer to file a charge-sheet when no case is made out according to his report.[51] Once cognizance has been taken, the proceedings can only be withdrawn with the permission of the court. This is the course available to the prosecution after it files the challan against any accused/[52] According to Section 173(4), whenever it appears from a report forwarded under Section 173(2) that the accused has been released on his bond *(ue.* under S. 169) the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit. The words "or otherwise as he thinks fit" indicate that if the Magistrate considers that the accused person was wrongly released, he has power to take cognizance of the case and to proceed to put the accused on trial.

The police report under Section 173 will contain the facts and the conclusions drawn by the police therefrom. When an investigation culminates into a final report as contemplated under Section 173 then the competent court enjoins a duty within its authority sanctioned by law to scrupulously scrutinise the final report and the accompaniments by applying its judicial mind and take a decision either to accept or reject the final report.[53] He is not bound by the conclusions drawn by the police. He may differ with the police report, be it a charge-sheet or be it a final report so called. He may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further.[54]

48. *Abhinandan Jha* v. *Dinesh Mishra,* 1968 Cri Lj 97: AIR 196S SC *Emperor* v. *Khivaja Nazir Ahmad,* (1945) 4 6 Cri LJ 413: *State of W.B.* v. *S.N. Bnsak,* bud5] 1 Cri LJ 341: AIR 196 3 SC 447; *Vasan of M.P.,* (2012) 2 SCC 731: (2.012.) r SCC
49. *Abhinandan jha* v. *Dinesh Mishra,* 1968 Cri LJ 97: AIR 1968 SC 117; *Vasanti*
50. *Valunimel Thomachen* v. *State,*
51. *Mutharaju Satyanarayan* v. *State*
52. *Vardaram* v. *State of Rajasthan,*
53. *Sampat Singh* v. *State of*
54. *H.S. Bains* v. *State (JJT of*

But if he decides to drop the case and there is protest petition filed by the complainant the Magistrate is entitled to initiate action on that petition.[55] However, if there is no indication by the informant that his protest petition may be treated as complaint and the Magistrate did not also consciously proceed as in a complaint case, mere filing of the protest petition would not make it obligatory for the Magistrate to treat it as a complaint case.[56]

In the event of the Magistrate's dropping the case in spite of the protest petition, however, the complainant should be heard before he drops the case.[57] The Supreme Court decision to this effect has been distinguished by the Delhi High Court holding that the requirement of hearing of the complainant arises only in cases that are dropped before taking cognizance. In other words, if the Magistrate had taken cognizance and then dropped the case, there is no necessity of informing the complainant.[58]

Relying on the Supreme Court decision referred to above, the Rajasthan High Court ruled that if on the protest petition of the complainant the Magistrate issues process and the accused prays for participating in the inquiry he should be permitted to do so.[59]

(e) Supplementary report on further investigation.—It is obvious from Section 173(2) that the police report under that sub-section is submitted on the completion of the investigation. However if the investigating police officer finds additional evidence as to the guilt or innocence of the accused person it W'ould be in the interests of justice to allow such officer to make further investigation and to send supplementary report or reports to the concerned Magistrate. This has been effected by enacting sub-section (8) to Section 173. According to that sub-section, nothing in Section 173 shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) [of S. 173] has been forwarded to the

Cri LJ 1308; *Surat Singh* v. *State of Punjab,* 1981 Cri Lj 585 (P&H); *Gyanendra Kumar Gupta* v. *State,* 1980 Cri LJ 1349, 1350 (AH); *Kali Singh* v. *State of Bihar,* 1978 Cri Lj 1575. 1581, 1583 (Pat); *Ram Autar Jalan* v. *State of Bihar.* 1986 Cri LJ 51 (Pat); *Pratap* v. *State of U.P.,* 1993 Cri Lj 1669 (All); *State of Karnataka* v, *K. Yarappa Reddy,* (1999) 8 SCC 715: 2000 SCC (Cri) 6r; 2000 Cri LJ 400; *Abu Thakir* v. *State ofT.N.,* (2.010) 5

55. *Ram Ekabal Pandey* v. *Kapildeo Rai,* 1984 Cri Lj 945 (Pat); *Gopal Mukherjee* v. *Upendra Nath Mukherjee,* 1984 Cri LJ 858 (Cal); *Munilal Thakur* v. *Nawal Kishore Thakur,* 1985 Cri LJ 437 (Pat); *India Carat (P) Ltd. v. State of Karnataka,* (1989) 2 SCC 132: 1989 SCC (Cri) 306: 1989 Cri LJ 963; *Pratap* v. *R. Pundit,* 1991 Cri LJ 1669 (Kant); *Venkate&h Narayanapjya* v. *Vittal,*
56. *Deokinandan* v. *State ofU.P.,* 199 6 Cri Lj 61 (All).
57 *Bhagwant Singh* v. *Gommr. of Police,* (1985) 2 SCC 537; 1985 SCC (Cri) 267: 1985 Cri Lj 1521; *Kallu* v. *Shahid Ali,* 1995 Cri LJ 3489 (Ail); *K.V.N. Koteswara Rao* v. *P.V. Krishna Prasad,* 1994 Cri Lj
58. *Gurchara n Singh* v. *Suresh Kumar Iain,* 1988 Cri Li 823 (Del).

Magistrate and where, upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to *(6)* [of S. 173] shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).[60] [of S. 173] A subsequent charge-sheet could not be submitted without further investigation by the police and without obtaining further evidence.[61] Nor can a Magistrate order further investigation after taking cognizance of an offence on police report and appearance of the accused in pursuance of the process issued. However, even if the party was discharged on the first report, the police on its own can resort to further investigation.[62] However it has been held that though strictly speaking there might not be any further investigation and collection of new material, yet in case the collected materials were misunderstood by the investigating officer and new light was thrown by his superiors then he could certainly file an additional charge-sheet in the light of proper guidance obtained from his superiors.[63][64][65]

In ordering further investigation under Section 173(8) the Magistrate need not hear the accused about whom an investigation report under Section 173(2) has been filed in the court.[64][65] However, if a witness is made accused after cognizance was taken, he should be heard.[63] An order for further investigation made under Section *i6j{b)* wherein no time-frame for completion of investigation has been made will not be invalid.[66]

There have been some decisions rendered by various High Courts with regard to the time at which investigation could be treated as complete. Where the Kerala and Delhi High Courts have held that the investigation would be complete only when the report is submitted by the police to the Magistrate, the Calcutta High Court has ruled that it is complete by the time the investigating officer forms his opinion to submit the report to the Magistrate.[67] Having regard to the scheme of various provisions as to the grant of bail etc., it seems that the Kerala and Delhi decisions are preferable.

60. *Arjitna Kumar*
61. *Re*
62. *Ra ndhir Singh*
63. D.D. *Patel* v.
64. *j. Alexander* v.
65. S.
66. *Ardhendu*
67. P.V. *Vijayaraghav*

It has also been categorically ruled by the Supreme Court that the judiciary can get a case investigated by special agencies like the CBI.[68]

The power to direct investigation conferred upon the Magistrate under Section 156(3) can be exercised by Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the case even after submission of the report as provided in Section 173(8).[68 69] It has been held that Section 173(8) is only permissive. Neither the prosecution, *i.e.* the informant nor the accused can claim as a matter of right a direction from a court commanding further investigation by the investigating officer under Section 173(8) after a charge-sheet was filed after investigation.[68 69 70] That section confers an express and specific power upon the investigating officer to carry on further investigation even after the cognizance is taken by the court.[71] However, there cannot be any direction for fresh investigation or reinvestigation.[72]

The power of the investigating officer to make further investigation in exercise of the statutory jurisdiction under Section 173(8) and at the instance of the State having regard to Section 36 should be considered in different contexts. This power of the State is wholly unrestricted by Section 36. Even lodging of second FIR in a case may not be a bar against further investigation.[73 74 75] There is no need for approval of judiciary.[74 75] It has been opined that further investigation could be ordered at any stage.[75]

68. *State* of W.R. v. *Sampat Lai.* (1985) 1 SCC 317: 1985 SCC (Cri) 62: 1985 Cri Lj 516: *Kashmeri Devi* v. *Delhi Admn.,* 1988 Cri Lj
69. *State of Bihar* v. *J.A.C. Saldanha,* (1980) *1* SCC 554: 1980 SCC (Cri) 272, 281-82: 1980 Cri LJ 98; also see, *State of* W.B. v. *Sampat Lai,* (1985) 1 SCC 317:1985 SCC (Cri) 62: T985 Cri Lj 516;
70. *Shyama Char an Dubey* v. *State of U.P.,* 1990 Cri LJ 456, 459 (All). See, *Rubabbuddin Sheikh* v. *State of Gujarat,* (2010) 2 SCC 200: {2010} 2 SCC (Cri) 1006 wherein
71. *Anil A. Lokhande* v. *State of Maharashtra,* 1981 Cri Lj 123, 130 (Bom); also see, *Kashmeri Devi v. Delhi Admn.,* 1988 Supp SCC 482: 198S SCC (Cri) 864: 1988 Cri Lj
72. See, *Ramachandran* v. R . *Udhayakumar,* (2008) <5 SCC 413: {2008) 2 SCC (Cri) 631: 2008 Cri Lj 4309; *Sivanmoorthy* v.
73. See, *Nirrnal Singh Kahlon* v. *State of Punjab,* (2009) 1 SCC 441: (2009) 1 SCC (Cri) 523: 2009 Cri Lj 958.
74. See, *Mithabhai Pashabbai Patel* v. *State*
75. *See,* discussions in *Kisban Lai* v. *Dharmendra Bafna,*

However the investigating officer does not have the right to submit a report after the first report was dropped as emanating from a mistake of fact.[76] [77]

8.15

Police to investigate and report in cases of unnatural or suspicious death

An officer in charge of a police station and other police officers specially empowered in this behalf are required by Section 174 to make investigation into cases of suicides and other unnatural or suspicious deaths and to report to the District Magistrate or the Sub-Divisional Magistrate. Section 175 empowers such police officers to summon persons for the purposes of such investigations. Sections 174 and 175 are as follows:

Police to enquire and report on suicide, etc.

174. (1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-Divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2.) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-Divisional Magistrate.

[77]G) [When—

(/} the case involves the suicide by a woman within seven years of her marriage; or

he case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or

the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or

iv) there is any doubt regarding the cause of death; or

[v] the police officer for any other reason considers it expedient so to do, he shall,] subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest

76. ***K. Ramasubbu*** v.

77. ***Sub9,*** by Act 46 of

Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

{4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-Divisional Magistrate and any other Executive Magistrate specially empowered In this behalf by the State Government or the District Magistrate.

The object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The report prepared is indeed aimed at serving a statutory function, to lend credence, to the prosecution case. However, the details of the FIR and the gist of the statements recorded during inquest proceedings get reflected in the report.[78] Mentioning of the name of the accused in the inquest report is not required by law.[79] Nor is it required to furnish details of the incident in the report.[80] The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174.[81] Nor are the lapses in filling up the inquest form are to destroy the prosecution case.[82] Names of accused etc. are not mentioned in inquest report. Nor could it be inferred from the absence of such information that the FIR did not exist at the time of inquest.[83][84][85] The Supreme Court's observations in a case, however, make one to expect some other information also to. be contained in the inquest report.[84][85] The court observed:

> We may also point out at this stage that the circumstances that the deceased was last seen in the company of the accused was not mentioned in the inquest report. Therefore the first circumstance also namely that the deceased was last seen in the company of the accused is not established beyond reasonable doubt.[S5]

The section does not seem to admit of this interpretation.

Reliance on the statements in the inquest report to the extent they relate to what the investigating officer saw and found is permissible but

78. ***Meharaj Singh*** v. ***State of U.P.,*** {1994) 5 SCC 188, 196:
79. *Baleshivar Mandat* v.
80. ***State ofU.P.*** v.
81. ***Pedda Naray***
82. *Budhish Chandra* v. *State ofU.P.,* 1991 Cri Lj 808 (Ail).
83. See, ***Rama Shankar*** v. ***State of U.P.,*** 2008 Cri Lj 129
84. ***Jaharlal Das*** v. ***State of Orissa,*** (1991) 3 SCC 27: 1991
85. ***Ibid,*** 36.

any statement made therein on the basis of what he heard from others would be hit by Section 162..[86]

Section 174(3} gi[ves] discretion to the police officer not to send the body for post-mortem examination by the medical officer only in one case, namely, where there can be no doubt as to the cause of the death. This discretion however is to be exercised prudently and honestly.[87]

However, the abovementioned discretion of the police officer is taken away completely in cases falling' under clauses (i), *(ii)* and *{Hi}* of subsection {3) of Section 174. In such cases the police officer is required to send the dead body of the woman for post-mortem examination if the state of weather and the distance admit of its being so sent without risk of such putrefaction on the road as would render such examination useless.

175. (1} A police officer proceeding under Section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case and every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which Section 170 applies, such persons shall not be required by the police officer to attend a Magistrate's Court.

Power to szimmon *persons*

Sections 175 gives power to the police to summon witnesses at the inquest. The inquest report is to be made by the investigating officer just to indicate the injuries which he has found on the bodies of the deceased persons. It may be witnessed by one or two persons but it is not at all necessary for the investigating officer to record the statements of the witnesses or to get the statements of witnesses signed on the inquest report and incorporate the same in it which introduces an element of chaos and confusion and demanding an explanation from the prosecution regarding the statements made therein.[88] The statements of witnesses during such inquiry are governed by Section 162. as is obvious from that section itself.[89]

The inquest report is a document of vital importance and has to be prepared promptly because it has to be handed over to the doctor along with the dead body to be sent for post-mortem examination. If the facts about the occurrence are mentioned in the inquest report, it would go to show that by that time the true version of the occurrence had been given therein. If, however, the facts of the incidents are not mentioned in the

86. ***George*** v. ***State of Kerala,*** (1998} 4 SCO 605: 199S SCO (Cri)

S7. ***K. P. Rao*** v. ***Public Prosecutor,*** (1975) 2. SCC 570: 1975 SCC (Cri)

88. ***Nirpal Singh*** v. ***State of Haryana,*** (1977} 2 SCC 131: 1977 SCC (Cri) 262, ***z6S: 1977*** Cr; Lj 642.

89. ***Marntbamutbu Kudumban, re,*** (1927) 28 Cri Lj 463: ILR 50 Mad 750; ***Hansraj*** v. ***Emperor,*** AIR 1936 Lah 341, 344.

inquest report it might mean that till that time the investigating officer making the inquest was not definite about the factual position.[90]

The inquest report cannot he substantive evidence;[91] but it may be used for corroboration of the evidence given by the police officer making the report.[92] According to the Supreme Court it is questionable how far an inquest report is admissible except under Section 145, Evidence Act.[93]

Inquiry by Magistrate into cause of death in police custody and into other cases of unnatural or suspicious deaths

8.16

Section 176 provides for such inquiries by Magistrates. The section reads as follows:

Inquiry by Magistrate ***into cause of death***

176. (r) [94]When the case is of the nature referred to in clause (/) or clause (//) of sub-section (3) of Section 174], the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of Section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

[97][(i-A) Where,—

{a) any person dies or disappears, or

{b) rape is alleged to have been committed on any woman,

while such person or woman is in the custody of police or in any other custody authorised by the Magistrate or the Court, under this Code, on addition to the inquiry or investigation held by the police, an inquiry shall be held by the judicial Magistrate or the Metropolitan Magistrate, as the case may be within whose local jurisdiction the offences have been committed.]

(z) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.

{3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

(4) Where an inquiry is to be held under this section, the Magistrate [90] [91] [92] [93] [94] [95] [96] [97]

90. *Banwari* v. *State of Rajasthan,* 1079 Cri Lj 161, *166* (Raj).
91. *Adi Bhumiani* v. *State,* 1957 Cri LJ T152: AIR 1957 Ori ZT6.
92. *Mukanda* v. *State,* 1957 Cri Lj 1187: AIR 1957 Raj 351.
93. *Pandurang* v. *State of Hyderabad,* 1955 Cri L] 57Z: AIR 1955 SC zi6.
94. The words "When any person dies while in the custody of the police" *omitted* by Act 25 of 2005, S. 18{1) (w.e.f. 23-6-2006).
95. *Ins.* by Act 46 of 19S5, S. 4.
96. The word "or" *omitted* by Act 25 of 2005, S. i8{i) (w.e.f. 23-6-2006).
97. *Ins.* by Act 25 of 2005, S. i8(ii) (23-6-2006).

[vs]{{ 5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under sub-section (i-A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical person appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing.]

Explanation.—In this section, the expression "relative" means parents, children, brothers, sisters and spouse.

The section appears to be based on the assumption that it is not always safe or advisable to rely upon the inquest made by police officers, particularly when it relates to death of a person in police custody.

Section iy6(i-A) has been inserted in 2005. It provides that in the case of death in custody or rape in custody, the court can conduct an inquiry which is other than police investigation. The dead body should be got examined by a Civil Surgeon or Registered Medical Practitioner within twenty four hours of the death of the person."

TABLE 7

Proceedin	By whom	**Objectand nature**	**Oath**
Investigatio n	By police or other authorised person (other . 1	Collection of evidence for the purposes of any inquiry or trial.	Oath cannot be administered to the persons examined or interrogated.
Inquest	(a) By police u/s. 174	*(a)* Ascertainment of the cause of death in cases of suicide, unnatural death, death caused in commission of	(o) Police cannot administer oath to person summoned for
	{b} By Magistrate u/s. 176	*(b)* Ascertainment of the cause of death occurring in police custody and in other cases mentioned in (cr) above	(ɒ) Magistrate may administer oath to persons examined by
Inquiry	By a Magistrate or court.	judicial determination of any question one relating to the guilt in the respect of any offence alleged} under	Oath can be (other than administered to persons examined.
Trial	-do-	Judicial determination as to the guilt or innocence of any person accused of	-do-

98. *Ins.* by Act 25 of 2005, S. 18 (₇₇) (23-6-1006'}.
99. *See,* S. 18 of Act 25 of 2005 adding S. 176(1-A) and 176(5} (w.ei. 23-6-2006)

Chapter 9

Local Jurisdiction of the Courts and the

Scope of the chapter 9.1

Sections 177 to 189 contained in Chapter XIII, Criminal Procedure Code,

1973 (CrPC) enunciate the general principles for determining which shall be the proper court to inquire into or try an offence. Further, as observed earlier, Section 156(1) makes these general rules applicable for deciding which shall be the proper police station to entertain investigations into an offence.[1] The basic rule in the context of local jurisdiction is contained in Section 177 which provides that *ordinarily* every offence is to be inquired into or tried by a court within whose local jurisdiction it was committed.[2] The jurisdiction of a police officer to investigate a case would depend upon a large number of factors including those contained in Sections 177,

178 and 181 CrPC.[3] It is interesting to note that the same principle has been adopted by our courts in granting anticipatory bail. As early as in 1994, the Punjab and Haryana High Court in *Harfit Singh* v. *Union of India*[4] opined that anticipatory bail can be granted by the High Court/ Sessions Court having territorial jurisdiction over the place of commission of the offence.

The Supreme Court of India also, of late, seems to

1. *See supra,* paras. 8.x *{b)* and 8.5: also see, *Satvinder Kaur* v. *State (Govt, of NCT of Delhij,* (1999} 8 SCC 728: *1999* SCC (Cri) 1503.
2. Provisions regarding the local jurisdiction of judicial Magistrates and courts are contained in Chapter li of the Code. *See,* Ss. 7, 8, 9, 12, 14,
3. See, *Naresh Kavarchand Khatri* v. *State of Gujarat,* (2008} 8 SCC 300: {2008) 3 SCC (Cri) 614.
4. 1994 Cri LJ 3134 (P&H): See contra, *Jodha Ram* v. *State of Rajasthan,* 1994 Cri Lj 1962 (Raj).

favour this view.[5] The subsequent sections namely Sections 178 to 186 and Section 188, considerably enlarge the ambit of the "local jurisdiction" in which the inquiry or trial of the offences might take place. This is intended to minimise the inconvenience that might be caused by the strict adherence to the basic rule incorporated in Section 177. The rules laid down in these sections "are not mutually exclusive but cumulative in effect and intended to facilitate the prosecution of offenders by providing a wider choice of courts for initiating the inquiry or trial"[6] [7] [8].

The provisions of Sections 177 to 189 are applicable to inquiries or trials of *offences.* They do not apply to proceedings under Chapter VIII (Security for keeping the peace and for good behaviour), Chapter IX (Order for maintenance of wives, children and parents), Chapter X (Maintenance of Public Order and Tranquillity).

9.2 Basic rule regarding place of inquiry and trial

Section 177 provides for the ordinary place of inquiry or trial. It says, "Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed." The rule is one of expediency. Considering the size of the country, the distance of courts from the place of crime and difficulties of transport in the interior, it would seem expedient and desirable that the inquiry and trial should ordinarily take place in the vicinity of the crime.[7] [8] As the witnesses can reasonably be expected to be available in that locality, it would be convenient both to the prosecution and to the defence if the trial took place in the court of that locality. It is also felt that the sense of social security is better maintained by requiring the dispensation of criminal justice to be done in the vicinity of the crime.[s]

Where the offence consists in acts of omission, such offence, according to Section 177, is to be inquired into or tried by a court within whose local jurisdiction the acts of omissions were committed.[9]

Though Section 177 uses the word "ordinarily", it only means except where provided otherwise in the Code or other law; the rule contained in the section shall govern all criminal trials held under the Code including trials of offences punishable under local or special laws.[10] The word "ordinarily" suggests that the section is a general one and is subject to the other special provisions of the Code or of any other law.[11] It also shows that the rule contained in the section is neither exclusive nor peremptory.

5. *State of Assam* v. *Brojen Gogol,* (15)98) 1
6. 41st Report, Voi. 1, p. 84, para. 15.13.
7. *Ibid,* p. Si, para. 15.13.
8. *Ibid,* para. 15.1.
9. D.C. *Bhoa/mick* v. *State,* 1978 Cri LJ 637, 638
10. *Narumal* v. *State of Bombay,* i960 Cri Lj 1674: AIR i960 SC 13x9, 1332.; see also, *ANZ Grmdlays Bank,* P.J.C. v. *Shipping & Clearing (Agents)*
11. *Nikka Singh* v. *State,* 1952 Cri Lj 775: AIR 1952 Punj 186.

The subsequent sections provide for alternative venues for inquiry and trial in respect of certain kinds of offences.

If a court has taken cognizance of an offence according to the rule contained in Section 177, and thereafter a change takes place in the territorial jurisdiction of such court, a question may arise as to whether the court loses its jurisdiction to try that offence. It has been held that the jurisdiction of the court to try such offence shall remain unaffected by any subsequent change in the territorial jurisdiction of the court.[12 13]

A Magistrate cannot be indifferent on the question of jurisdiction simply because Section 462T is there to save decisions of courts which had no territorial jurisdiction to try the case. If the question of jurisdiction is raised, the trial can be commenced only after deciding that question. Otherwise Section 177 will become otiose. Not only that, the application of Section 462 arises only after the decision is rendered by a court which has no territorial jurisdiction.[14 15]

The place of inquiry or trial of an offence is primarily to be determined by[r] the averments contained in the complaint or the police report (charge-sheet) as to where and how the offence was committed. In the absence of any positive proof to the contrary, the court has to be presumed to have jurisdiction on the basis of the facts made out by the averments.'?

Rules to cover cases where the basic rule is difficult to apply 93

The following rules are devised by Section 178 in order to prevent an accused person from getting off completely because there might be some uncertainty and doubt as to what particular Magistrate or court has the local jurisdiction to inquire into or try the case.[16 17] The prosecution intending to take advantage of any of these rules will have to aver that the offence was committed in the circumstances mentioned in the rules.''

Local areas of the commission of offence uncertain When it is uncertain in which of several local areas an offence was committed, it may be inquired into or tried by a court having jurisdiction over any such local areas. [S. 178(3]

93.1

12. *Emperor* v. *Ganga,* (1912} 13 Cri Lj 575: ILR (1912} 34 All 451; *Emperor* v. *Sayeruddhi Pramanik,* (1939) 40 Cri LJ 270: AIR
13. For t [C]e text of S. 462, *see infra,* para. 9.13.
14. *Abhay Lalan* v. *Yogendra MadhaviaL* 19Si Cri LJ 1667, 1668 (KerJ.
15. *Slate of* M.P. v. *K. P. Ghiara* , 1957 Cri LJ 322: AIR 1957 SC 196; *Brahmanand Goyal* v. N.C. *Chakraborty,* 3974 Cri LJ 1079 {Cal}; *Abhay Lalan* v. *Yogendra MadhaviaL* 1981 Cri Lj 1667,
16. *Dehendra Nath Das Gupta* v. *Registrar of Joint Companies.* ILR {1918} 45 Cal 490; *Punardeo Na rain Singh* v. *Ram Sarup* Roy, ILR 25 Cal 858, 860, 862-63; *Mahadeo* v. *Emperor,* (1910) 1 T Cri Lj 372: ILR {1910} 32 AM 397; *Anthony* D' *Mello* v. *Joseph*
17. *State* v. *Dhulaji Bavaji,* {1963} 2 Cri Lj 273: AIR 1963 Guj 234.

The words "local areas" mean obviously the local areas to which the Code applies and not any local area in a foreign country.[18] In a case involving the offence of criminal breach of trust, the property was received in place *X* and was dishonestly disposed of by the accused in either place *X* or place Y, the case can be inquired into or tried by a court having local jurisdiction over place X or place Y.[19]

9*3.2 *Offence committed partly in one local area and partly in other*

Where an offence is committed partly in one local area and partly in another, it may be inquired into or tried by a court having jurisdiction over any of such local areas. [S. *178(b)]*

If an offence is commenced within the local jurisdiction of one court and is completed within the local jurisdiction of another court, such an offence may be tried by either of the two courts.[20]

9*3.3 *Continuing offence*

Where an offence is a continuing one, and continues to be committed in more local areas than one, it may be inquired into or tried by a court having jurisdiction over any of such local areas. [S. 178(c)]

A conspiracy to commit an offence has been treated as a continuing offence.[21] The offence of kidnapping from lawful guardianship is not a continuing offence while the offence of abduction is a continuing one. Travelling without a valid passport is a continuing offence.[22]

9.3.4 *Several acts constituting the offence done in different local areas*

Where an offence consists of several acts done in different local areas, it may be inquired into or tried by a court having jurisdiction over any of such local areas. [S.fv 178(d)]

9.4 Offence triable where act is done or consequences ensued

Offence triable where act is done or consequences ensues

179. When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensued.

The following illustrations elucidate the rule:

18. *Bichitranund Dass v. Bhug But Perai,* ILR (1889) 16 Cal 667, 676; *Hiralal* v. *Emperor,* AIR 1946 Nag 12.8, 12.9.
19. *State of M.P.* v. *K.P. Ghiara,* 1957
20. *Mangaldas Raghauji Ruparel* v,
21. *Abdul Kader v. State,* (1964) 1 Cri Lj
22. *Abdul Samad* v. *State ofU.P.,* AIR

(/) A is wounded within the local jurisdiction of court X, and dies within the local jurisdiction of court Y. The offence culpable homicide of A may be inquired into or tried by X or Y.

(ii) A is put in fear of injury within the local jurisdiction of court X, and is thereby induced within the local jurisdiction of court Y to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

Section 179 contemplates that the accused has done an act and a consequence has followed from such act, and that the accused is being tried for the offence as result of both that act and the consequence.[23] Even the place(s) where the consequence of the criminal act "ensues" would be relevant to determine the court of competent jurisdiction. Section 181 also leaves no room for any doubt that culpability is relatable even to the place at which consideration is required to be accounted for.[24] The words "any consequence which has ensued, have been held to mean only such a consequence as is a necessary ingredient of the alleged offence"[25]. These words do not cover a more remote consequence. The offence of forgery and fabricating of a false document was committed within the local jurisdiction of court X. The said document had stated that the resignation of the complainant was accepted and that his services were terminated. On the complainant's request a copy of that document was sent to the complainant who received the same within the local jurisdiction of court Y". It was held that as the fact of receiving the copy of the document could not be considered as a consequence necessary to constitute the offence, court Y could not have any jurisdiction to try that offence.[26]

Place of trial where act is offence by reason of relation to other offence

9.5

Place of trial where act is an offence by reason of relation to other offence

180. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, the first-mentioned offence may be inquired into or tried by a court within whose local jurisdiction either act

The following fact-situations will illustrate the above principle:

(i) A charge of abetment may be inquired into or tried either by the court within whose local jurisdiction the abetment was committed

23.

24. See, discussi

25. *Mohd. Umar* v, *Thakur Prasad*

26. *Mcleod &* Co. v. *Gummalla Namsimha Rao.* 1-973 Cri LJ i486 (AP).

or by the court within whose local jurisdiction offence abetted was committed. However, if the criminal act for which the abetment is given is not in fact actually committed, the principle enunciated above cannot apply and the offence of abetment can be tried only at the place where it has been committed.

(ii) A charge of receiving or retaining stolen goods may be inquired into or tried either by the court within whose local jurisdiction the goods were stolen or by any court within whose local jurisdiction any of them was at any time dishonestly received or retained.

The first mentioned offence under Section 180 is the act which becomes an offence by virtue of its relation to any other act which is also an offence and it is such an act which can be inquired into or tried by the court within whose local limits either act was done, but it would not be vice versa.[27] To illustrate, it may be added to the above illustration *(ii)* that so far as the offence of theft *(i.e.* stealing the goods) is concerned, that can be tried only at the place where the theft was committed and not at the place of receiving or retaining the stolen goods, unless by virtue of special provisions contained elsewhere in the Code that has been made possible, as for instance, Section 181(3).

Though the offence of criminal conspiracy and the offence committed in pursuance of the conspiracy cannot be, strictly speaking, covered by the words "when an act is an offence by reason of its relation to any other act which is also an offence", yet for other reasons it has been held that the court within whose local jurisdiction the offence of conspiracy has been committed would have jurisdiction to try also the offence which has been committed in pursuance of the conspiracy, despite the fact that the place of the commission of such consequential offence is outside the local jurisdiction of such court.[28]

Where an offence of cheating is committed by *A* by making a false representation to C at place X, and by inducing C to deliver any property to A's abettor *B* at place Y, in such a case, *A* and *B* can be tried jointly by either of the courts within whose local jurisdiction place X or place Y is situate. This could be possible because of the combined effect of Sections 179 and 180.[29]

9.6 Place of trial in case of certain specific offences

Section 181 provides for alternative local jurisdictions as to inquiry or trial in respect of certain offences:

27. *State of Gujarat* v.

28. *Purushot*

29. *K. Satwant Singh* v.

Being a thug, dacoit, escaping from custody 9.6.1

181. {x} Any offence of being a thug, or murder committed by a thug, of dacoity, of dacoity with murder, of belonging to a gang of dacoits, or of escaping from custody, may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the accused person is found.

Place of trial in case of certain offences

The first part in each of the sub-sections (i), (3), (4) and {5} of Section x8x is redundant because Section 177 itself provides that every offence shall ordinarily be inquired into and tried by the court within the local limits of whose jurisdiction it was committed.

This rule in Section 181(1) is intended to cover the case of an accused person moving from one local area to another area, fn the corresponding section of the Code of 1898, the alternative place of trial was referred to as the place where "the person charged is". These words were interpreted by the courts as meaning not only the place where the accused person is "found or discovered", but also a place where he is brought under arrest.[30] In the present Code, the above rule, Section 181(1), refers to the place of alternative jurisdiction as the place where "the accused person is found".

The deliberate change in the wording of the rule would suggest that the legislature intended to discard the wide interpretation put by the courts on the old wording and to continue it to the place "where the accused person is found" *i.e.* discovered. This appears to be quite a plausible inference.

However, the word "found" used in Section 188 of the Code of 1898 in similar circumstances has been interpreted by courts as meaning not where a person is discovered but where he is actually present even though brought under arrest illegally and against his wall.[31] This position makes it doubtful whether the legislature in fact wanted to put a narrow interpretation by the use of the words "the accused person is found". However, it is submitted that the wider interpretation would have the effect of unreasonably giving to the prosecution an unlimited choice as to the venue of the trial in case of such offences.

Kidnapping and abduction 9.6.2

181. (2.) Any offence of kidnapping or abduction of a person may be inquired into or tried by a Court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained.

The word "conveyed" does not include "conveyance by police or magisterial authority after arrest".

30. *Emperor* v. *Gobinda.* {1911} 12 Cri LJ 11:3 {Punj CC); *Lalchand v. State.* (1961) T Cri Lj 841: AIR 1961 Pat 2.60.

31. *Empress* v. *MaganlaL* ILR (1882) *6* Bom 622; *Emperor* v. *Vinayak Damodar Savarkar,* ILR

9.6.3 *Theft, extortion, robbery*

181. {3} Any offence of theft, extortion or robbery may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property which is the subject of the offence was possessed by any person committing it or by any person who received or retained such property knowing or having reason to believe it to be stolen property.

9.6.4 *Criminal misappropriation, criminal breach of trust*

xSi. (4} Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

The requirement is to be determined on the basis of the stipulation, if any, between the parties *i.e.* the complainant and the accused as to where the goods are to be returned or to be accounted for. In the absence of any such stipulation it would be the place where the goods in question were kept in trust and a breach in respect thereof was committed.[32]

In many cases of criminal breach of trust there may be doubts as to the exact manner, point of time and place where the dishonest misappropriation, conversion, use or disposal was effected. Since these matters are within the special knowledge of the accused, the complainant is unable to adopt the jurisdiction within which the offence has been committed. Though no such doubts ordinarily arise in regard to the place or places where the property in question was received or retained by the accused, these places are not always suitable for launching the prosecution.[33]Therefore, it has been provided that the offence can even be inquired into or tried by a court within whose local jurisdiction the property was required to be returned or accounted for by the accused person. The requisite "requirement" is to be determined on the basis of the stipulation, if any, between the parties, *i.e.* the complainant and the accused as to where the goods are to be returned or to be accounted for. In the absence of any such stipulation, it would be the place where the goods in question were kept in trust and a breach in respect thereof was committed.[34]

Where the accused was under a liability to deliver goods at Bangalore and failed to do so by reason of having committed an offence of criminal breach of trust as alleged by the complainant, the Bangalore court has jurisdiction to inquire into and try the alleged offence of criminal breach of trust under the provisions of Section 181(4).[35]

32. *Harjeet Singh*
33. 41S E Report,
34. *Harjeet Singh*
35. Mysore

It has been held by courts that there need not be dishonest intention to misappropriate at the time the property is received or retained. Even if the property is received quite innocently at one place and is later dishonestly dealt with in another place, the accused can be tried at the former place.[36]

Where it is uncertain whether the misappropriation took place at place *A* or at place B, Section 178(a) would apply and the offence would be tried at either place.[37] Section 178(a) is supplemental to Section 181(4) [anA] is not excluded by it.

Offence relating to possession of stolen property 9.6.5

181. (5) Any offence which includes the possession of stolen property may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property was possessed by any person who received or retained it knowing or having reason to believe it to be stolen property.

Cheating *9.6.6*

182.. (1) Any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

Offence committed by letters, etc

In some cases of cheating, the offence is caused by making false representations by letters, telegrams, etc. and the victim is induced to deliver property to the accused's agent at a different place. In such cases, as has been held by the Supreme Court, no part of the offence of cheating takes place at the accused person's end and the entire offence of cheating is committed at the deceived person's end.[38] In such a situation, the application of either Section 178 or Section 179 might be considered as of doubtful validity. There should however be no objection in principle to the person accused of cheating from a distance being triable for the offence not only at the place where his victim was deceived and/or made to part with his property, but also at the place from where the accused has been carrying on his dishonest practices and reaping the benefit.[39] Section 182(1), therefore, makes provision to this effect.

36. *Emperor* v. *Laxman,* ILR (1926) 51 Bom 101; *Aya Ram* v. *Gobind Lai Verrna,* (1933) 34 Cri Lj 902: AIR 1933 Lah 559; *Ram*
37. *State of M.P.* v. *K.* P. *Ghiara,* 1957 Cri Lj 322,: AIR 1957 SC 196.
38. *Mobarik* Ali *Ahmed* v. *State of Bombay,* 1957 Cri Lj 1346: AIR 1957 SC 857, 866.
39. 41st Report, VoL 1, p. 91, para. 15.36.

9.6*7 *Bigamy*

182. (2} Any offence punishable under Section 494 or Section 495 of the Indian Penal Code (45 of i860) may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage, or the wife by the first marriage has taken up permanent residence after the commission of the offence.[40]

In the absence of such special provision, the offence of bigamy could be inquired into or tried only at the place where the offence is committed. This fact coupled with the statutory restriction that a complaint by the aggrieved wife or husband is necessary for initiating proceedings against the bigamist,[41] would place undue obstacles in the way of prosecuting the latter. It makes it easy for that person to go to a distant place, perhaps in another State, get the second marriage performed, return with impunity to his or her usual place of residence and live with his or her second spouse in the same neighbourhood as the first. That makes it pretty difficult for the aggrieved party to take proceedings against that bigamist at a distant place. Since the offence of bigamy is an attack on the institution of marriage in which the society is concerned, it is necessary that practical opportunity to bring offenders before the courts should not be denied by restricting the venue to the local areas where the bigamous marriage was actually performed.[42] The above rule contained in Section 182(2) is intended to give such practical opportunity for bringing offenders before the court by specially widening the basic rule regarding venue contained in Section 177. It has been clarified that the incorporation of the clause "or the wife by the first marriage has taken up permanent residence after the commission of the offence" in Section 182(2} is mainly to facilitate the first wife to file a complaint at the place where she permanently resides after the commission of the offence.[43]

Place of inquiry or trial when the offence is committed on journey or voyage

183. When an offence is committed whilst the person by or against whom, or the thing in respect of which, the offence is committed is in the course of performing a journey or voyage, the offence may be inquired into or tried by a Court through or into whose local jurisdiction that person or thing passed in the course of that journey or voyage.

9.7

Offence committed on journey or voyage

40. *See also,*
41. *Slee,*
42.
43. *Tek mn*

When an offence is committed in a journey or voyage it might sometimes be difficult to know the exact locality of the actual commission of the offence. Therefore in determining the venue of the trial in such cases, there might he doubts, inconveniences, and difficulties. Section 183 is intended to remove such doubts and difficulties by providing numerous alternatives while deciding as to the venue of the inquiry or trial. The court having local jurisdiction at the place of termination of the journey is also competent to try the accused for an offence committed in the course of a journey.[44]

The words "journey" and "voyage" appear to mean one and the same thing. The section would be applicable only when the journey is continuous and uninterrupted.

The section applies for the trial of offences committed in India only.[45]

Place of trial for offences triable together

9.8
Place of trial for offences

184. Where—

(a) the offences committed by any person are such that he may be charged with, and tried at one trial for each such offence by virtue of the provisions of Section 219, Section **2,2.0,** or Section 221, or *{b)* the offence or offences committed by several persons are such that they may be charged with and tried together by virtue of the provisions of Section 223,

the offences may be inquired into or tried by any Court competent to inquire into or try any of the offences.

When an accused person under Section 219, 220, or 221 can be charged with and tried at one trial for all or more offences, it is hut reasonable to assume that the venue for the trial can be laid in any local jurisdiction within which any of those offences may be inquired into or tried under the abovementioned rules of Chapter XIII of the Code. Similarly when two or more persons may be charged with and tried together for different offences under Section 223, the prosecution would have similar choice of venue for the trial.[46]

Apart from the rule contained in Section 184, it would be obvious that the provisions of Section 223 are not controlled by Section 177. It has been observed that there should be no reason why the provisions of Sections 219 to 223 might not also provide exceptions to Section 177, if they do permit the trial of a particular offence along with others in one court.[47]

44. *Cbaranjit Singh* v. *State of H.* P,, 1986 Cri Lj 173 (HP).
45. *Public Prosecutor v. Pedimonu Peary.* (1929) 50 Cri Lj 245: ILR (1929) 52 Mad *61.*
46. 4Tst Report. Vol. I, pp. 94-95, para. 15.45.
47. See, observations of the Supreme Court in *Purashotlamdas*

9.9 Power of the State to order cases to be tried in different Sessions Divisions

Power to order cases to be tried in different Sessions Divisions

185. Notwithstanding anything contained in the preceding provisions of this Chapter, [Ss. 177-184] the State Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division:

Provided that such direction is not repugnant to any direction previously issued by the High Court or the Supreme Court under the Constitution, or under this Code or any other law for the time being in force.

The power conferred on the State Government by Section 185 is "an extraordinary power intended to be used only when some consideration of public interest *(e.g.* maintenance of public order during the trial of a sensational case) justifies the holding of a sessions trial in a different sessions division"[48].

It may be noted that though the proviso to Section 185 restrains the State Government from passing any such order which is repugnant to any direction issued earlier by the High Court or the Supreme Court in this behalf, the High Court or the Supreme Court are, however, free to give any direction overriding the effect of the order passed by the State Government under Section 185, in accordance with the provisions of Sections 406 and 407.[49 50]

9.10 High Court to decide, in case of doubt, district where inquiry or trial shall take place

High Court to decide, in case of doubt, district where inquiry or trial shall take place

186. Where two or more Courts have taken cognizance of the same offence and a question arises as to which of them ought to inquire into or try that offence, the question shall be decided—

(a) if the Courts are subordinate to the same High Court, by that High Court;

lb) if the Courts are not subordinate to the same High Court, by the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced and thereupon all other proceedings in respect of that offence shall be discontinued.

The section does not provide that the court which was the first to take cognizance of the offence, would be the one which ought to inquire into

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Section *186(b)* applies only when both the cases are common and they arise out of the same occurrence or same transaction, and the parties are the same, in which case, having regard to the circumstances, the High Court within whose local limits of appellate criminal jurisdiction the proceedings were first commenced would have jurisdiction to involve powers under Section 186(h).[51][52][53] But where the two complaints are different from each other, dates of occurrences are different and some of the accused are also different, Section 186(h) cannot be applied.[52][53]

Magistrate's power to inquire into an offence committed outside his local jurisdiction

9.11

Section 187 confers on the Magistrates of the First Class a power to initiate action against any person within their jurisdiction who is reasonably suspected to have committed an offence triable by a court outside that jurisdiction. Section 187 is as follows:

Power to issue summons or warrant for offence committed beyond local jurisdiction

187. (1} When a Magistrate of the first class sees reason to believe that any person within his local jurisdiction has committed outside such jurisdiction (whether within or outside India) an offence which cannot, under the provisions of Sections 177 to 185 (both inclusive), or any other law for the time being in force, be inquired into or tried within such jurisdiction but is under some law for the time being in force triable in India, such Magistrate may inquire into the offence as if it had been committed within such local jurisdiction and compel such person in the manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is not punishable with death or imprisonment for life and such person is ready and willing to give bail to the satisfaction of the Magistrate acting under this section, take a bond with or without sureties for his appearance before the Magistrate having such jurisdiction.

(2) When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

It will be seen that though the Magistrate does not take cognizance of the offence in the technical sense, he is empowered by the section to inquire into it as if it had been committed within his local jurisdiction, compel the person to appear before him and bind him to appear before a Magistrate who will have jurisdiction to inquire into the offence."[3]

It may be noted that the power given to the Magistrate under Section 187 is available both in respect of cognizable as well as non- cognizable offences.

51. *State of M.P. v. Bahadursingh,* 17S4 Cri Lj 1065 (MP).

52. *G. Sreeramulu* v. V'. *Rangasutamy,* 1978 Cri Lj 1475, 1476

53. *See,* 41st Report, Vol. I, p. 97, para. 15.54.

The power to grant bail in respect of offences not punishable with death or imprisonment for life is intended to give to the arrested person the benefit of getting bail at or near the place where he is arrested instead of his being compelled to go to a far off place in custody for getting bail.[34] The section, however, does not override the provisions of Sections 75 to Si which deal with execution of warrants of arrest.[20]

9.12 Power to inquire into and try offences committed outside India

Section 188 provides for the necessary procedural counterpart to Section 4 IPC, and to those substantive penal laws which have extra-territorial application. Section 188 is as follows:

Offence committed outside India

188. When an offence is committed outside India—

{a} by a citizen of India, whether on the high seas or elsewhere; or {b} by a person, not being such citizen, on any ship or aircraft registered in India,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

At the outset one anomalous position caused by Section 188 may be noticed. According to the definition of "India" as given in Section i(/), "India" means the territories to which this Code extends. Section 1(2) provides that the Code extends to the whole of India except the State of Jammu and Kashmir. The result is that if a citizen of India, whether he is a resident of that State or of some other State in India, commits an offence in Jammu, he may be dealt with at any place in any other State of India where he may be found, but no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government. In case of a foreigner committing an offence in the State of Jammu and Kashmir, he cannot be prosecuted here in "India" even with the previous sanction of the Central Government. This is indeed an anomalous and unsatisfactory situation. The situation in the present circumstances cannot be changed as Parliament's power to legislate for the State does not at present extend to items 1 and 2 of the Concurrent List relating to criminal law and criminal procedure. The anomalous situation should be changed by first suitably amending the Constitution (Application to Jammu and Kashmir) Order, 1950 under Article 370 and then extending the IPC and CrPC to that State.[56 54 55 56 54 55 56]

54. Report of

55.

56. See, 41st

Section 188 is not governed or controlled by the preceding Sections 178 to 187. This is amply clear from the non-obstante clause—"notwithstanding anything in any of the preceding sections ..."—used in the proviso to Section 188. On the other hand, Section 188 controls and governs the provisions contained in Sections 178 to 1877

When an offence is committed by a person outside India as described in Section 188, he can be dealt with (in respect of such offence) at any place at which he is found. In such a situation it does not matter whether such person comes voluntarily or in answer to summons or under illegal arrest. It is enough that the court should find him present when it comes to take up the caseW In fact, this section provides for the necessary procedural complement to Section 4 IPC and other penal laws which have extraterritorial application.-[19]

The object of requiring the sanction of the Central Government appears to be to prevent the accused person being tried over again for the same offence in two different places. This object is secured by refusing to extradite the offender if he is wanted for being tried in a foreign country subsequent to his trial in an Indian court, or by refusing to sanction a prosecution against him if he has been already tried in a foreign country in respect of the same offence. On the other hand, if a person has been convicted and sentenced to nominal punishment or has been acquitted after a colourable trial in a foreign court, and if he is afterwards found here In India, the Central Government might give the sanction to prosecute him here in an Indian court for the same offence. The flexible rule regarding the sanction for the prosecution prevents a person from being tried twice for the commission of the same offence and at the same time ensures that the person is not able to take advantage of a sham or colourable trial in a foreign country in order to avoid being tried here for that offence. The Central Government w'ould and should take into consideration all the aspects of the case before granting sanction under Section 188.

The proviso to Section 188 has given rise to conflicting decisions by the Kerala High Court. A Division Bench in *Muhammed* v. *State of Kerala*** ruled that the police can investigate into a crime committed in a foreign country. This decision came to be dissented from by a Single Judge In *Samaruddeen* v. *Director of Enforcement*[57 58 59 60 61] *(Samruddin),* wherein it [57 58 59 60 61]

57. *T. Fakhrulla Khan* v. *Emperor,* AIR 1935 Mad 32.6; *M.L. Verghese, re,* AIR 1947 Mad 352.;
58. *Sahebrao Bajira4* v. *Suryabhan Ziblaji,* {1948) 49
59. A.V. *Mohan Rao* v. M. *Kishan Rao,* {2002} 6 SCC 174: 2002 SCC (Cri) 1281.
60. (1994) 1 KLT 464.
61. 1995 Cri Lj 2825 (Ker).

held that the court had no jurisdiction to direct investigation or trial of a crime committed by a person in a foreign country without the sanction of the Central Government.

In a subsequent decision in *Mohd. Sajeed K.* v. *State of Kerala*[62], another Single Judge differed with the Single Judge's opinion in *Samaruddin* and reasoned that the stage prior to the framing of a charge is an inquiry and the stage after framing the charge is trial. The court further ruled that what is prohibited in the proviso to Section 188 is only inquiry or trial without the previous sanction of the Central Government and not investigation by the police for the purpose of collection of evidence.

The circumstance that after committing the offence of theft at a place in Pakistan a person becomes domiciled in India and acquires Indian citizenship cannot confer jurisdiction on Indian courts retrospectively under Section 188 for trying the offence of theft committed and complete in Pakistan at a time when that person was not an Indian citizen at all.[63]

Section 189 provides for a special rule of evidence and enables a court dealing with a case under Section 188 to receive copies of depositions before a judicial officer in the concerned foreign country as evidence in such a case. Section 189 is as follows:

Receipt of evidence relating to offences committed outside India

> 189. When any offence alleged to have been committed in a territory outside India is being inquired into or tried under the provisions of Section 188, the Central Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before a judicial officer in or for that territory or before a diplomatic or consular representative of India in or for that territory

9.13 Consequences of failure to follow the rules regarding local jurisdiction

At the outset it may be mentioned that the jurisdiction of a criminal court is of two kinds. One has reference to the power of the court to try particular kinds of offences.[64] This jurisdiction goes to the root of the matter, and if a court which is not empowered to try a particular offence does try that offence, the entire trial shall be void. Section 461, which deals with irregularities which vitiate proceedings, provides by clause (1) that if any Magistrate not empowered by law in this behalf tries an offender, his proceedings shall be void. The other type of jurisdiction is what is called territorial or local jurisdiction which is determined according to the rules

contained in Sections 177 to 188 of the Code. Section 462 provides for the consequences of the failure to follow these rules. Section 462 is as follows:

> 462. No finding, sentence or order of any Criminal Court shall be set aside *proceedings in wrong* merely on the ground that the inquiry, trial or other proceedings in the *place* course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, *unless* it appears that such error has in fact occasioned a failure of justice.

It is obvious that the same importance which is attached under the Code to the powers of criminal courts is not attached by it to the territorial or local jurisdiction of the courts. The reason for such difference between the effect of a case being tried by a court not competent to try the offence and the effect of a trial by a court which is competent to try the offence but which has no territorial jurisdiction over the areas where the offence was committed, is understandable. The power to try offences is conferred by the legislature on all courts according to its view with respect to the capability and responsibility of those courts, and higher the capability and sense of responsibility, the larger is the jurisdiction vested in the court over the various offences. On the other hand, the territorial jurisdiction is provided just for the purpose of convenience keeping in mind the administrative point of view with respect to the work of each court, and the convenience of the parties and the witnesses who have to appear before the court.[61]

Section *A6Z* would apply to only those cases where the trial has proceeded to its termination and the court is satisfied that no failure of justice has been occasioned by the trial having taken place in a wrong court.[65 66] In order that proceedings in a wrong place may be set aside, it must be shown that the trial had occasioned a failure of justice.[65 66 67] A failure of justice does not simply mean an erroneous decision. It means that the procedure has not been followed which would give the person affected a fair opportunity to defend himself.[68]

Keynote for applying Section 462 is failure of justice; where simply a question of jurisdiction has been decided by the lower revisional court, it cannot be said that reversal of the decision of the lower revisional court shall result in failure of justice.[69]

It may, however, be noted in this connection that Section 462 does not

65. *Purushottamdas Dahnia* v. *State ofW.B.,* (1961) 2 Cri LJ 728: AIR r961 SC 1589
66. *Sukhdev Singh* v. *Sukhvinder Kaur.,* 1974 Cri Lj 229 (P&H).
67. *Ram Chandra Prasad* v. *State of Bihar,* (1961) 2 Cri Lj Sir: AIR 1961 SC 1629; *hiasiruddin Khan* v. *State of Bihar,* (1973) 3 SCC 99:
68. *Emperor* v. *Mehtar,* (194:0-42 Cri Lj 37: AIR 1940 Nag 375; *Gurbacban Singh* v. *State of Punjab,* 1957 Cri Lj 1009: AIR 1957 SC
69. *Ganga Sharan Varshney* v. *Shakuntala Devi,* 1990 Cri Lj 128 (Ail).

the fact that there is no territorial jurisdiction. Where the objection as to jurisdiction has been taken up before or at the time of commencement of the trial, no shelter can be taken behind Section 462.. To say that because the complainant has after all instituted his complaint though in a wrong court it should be allowed to proceed as no prejudice would be occasioned on that account to opposite side, is virtually to suggest that the complainant is at liberty to choose his own forum regardless of its having the requisite local jurisdiction, and then to say that the wrong step taken by him should be perpetuated as there is no prejudice caused to the opposite party.[70] This obviously cannot be the intention of the legislature.

70. *Stikhde*

Chapter 10

Cognizance of Offences

Cognizance of offences by Magistrate 10.1

Sections 190 to 199 describe the methods by which, and the limitations subject to which, various criminal courts are entitled to take cognizance of offences.[1] Section 190(1) provides that subject to the provisions of Sections 195 to 199, any Magistrate of the First Class and any Magistrate of the Second Class specially empowered in this behalf may take cognizance of any offence

(a) upon receiving a complaint of facts which constitute such offence;

{b} upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed.

The Chief judicial Magistrate may specially empower any Magistrate of the Second Class as mentioned above to take cognizance of such offences as are within his competence to inquire into or try. [S. 190(z)]

Definitions

The term "complaint" has been defined in Section z(d) as meaning

2. (d) any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Clause *{d)* of Section z also explains:

> A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.

t. *See,* 41st Report, p. 102, para. 15.72.

The report of a police officer following an investigation contrary to Section 155(a)[2] could be treated as complaint under Sections *z(d)* and ipo(i){iz) if at the commencement of the investigation the police officer is led to believe that the case involved the commission of a cognizable offence, or if there is a doubt about it and the investigation establishes only commission of a non-cognizable offence. If at the commencement of the investigation it is apparent that the case involved only commission of a non-cognizable offence, the report followed by the investigation cannot be treated as a complaint under Section *z(d)* or Section 190(1 *){a)* of the Code.[3]

The expression "police report" has been defined by Section *z{r)* as meaning "a report by a police officer to a Magistrate under Section 173(2,)", *i.e.* the report forwarded by the police after the completion of investigation. The offences which a Magistrate of the Second Class is competent to try are shown in the First Schedule of the Code. *[See also,* S. *26]*

What is taking cognizance has not been defined in the Code. The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means "become aware of" and when used with reference to a court or judge, "to take notice judicially".[4] Taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence for the purpose of proceeding to take subsequent steps (under Section 200 or Section 202, or Section 204) towards inquiry and trial.[5] However, when a Magistrate applies his mind not for the purpose of proceeding as mentioned above, but for taking action of some other kind, for example, ordering investigation under Section 156(3), or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence.[6] The word "cognizance"

2. According to S. 155(2), no

3. *P.*

4. *Ajit Kumar Ralitw*

5. T*ula Ram* v. *Kishore Singh,* (1977) 4 SCC 459, 463: 1977 SCC (Cri) 621: 1978 Cri Lj 8; *Darshan Singh Ram Kishan* v. *State of Maharasht*

6. *'Tula Ram* v. *Kish ore Si ngh,* (1977) 4 9C C 459, 463; 1977 SCC (Cri)

has been used in the Code to indicate the point when the Magistrate or a judge first takes judicial notice of an offence. [7] Taking cognizance includes intention of initiating a judicial proceeding against an offender in respect of an offence or taking steps to see whether there is a basis for initiating a judicial proceeding.[8] It is a word of indefinite import, and is not perhaps always used in exactly the same sense.

Ordinarily, a private citizen intending to initiate criminal proceedings in respect of an offence has two courses open to him. He may lodge a first information report before the police if the offence is a cognizable one, or he may lodge a complaint before a competent Judicial Magistrate irrespective of whether the offence is cognizable or non-cognizable. The object of the Code is to ensure the freedom and safety of the subject, in that it gives him the right to come to court if he considers that a wrong has been done to him or to the Republic and be a check upon police vagaries.[9] [10] [11] The Supreme Court in *Azija Begum* v. *State of Maharashtra*™ had occasion to explain thus:

> In the facts and circumstances of this case, we find that every citizen of this country has a right to get his or her complaint properly investigated. The legal frame work of investigation provided under our laws cannot be made selectively available only to some persons and denied to others. This is a question of equal protection of laws and is covered by the guarantee under Article 14 of the Constitution,[55]

As observed earlier,[12] when a complaint is filed before a Magistrate, the Magistrate may simply order investigation by the police. The police may then investigate the case and submit the report to the Magistrate. In such a situation, when the Magistrate then proceeds with the case, a question of some importance arises as to whether the Magistrate had taken cognizance of the offence on the complaint before sending it for investigation, or whether the case was sent to the police without taking "cognizance" of the offence and the cognizance was taken only on the report submitted by the police. There are certain advantages to the complainant if cognizance is taken on a complaint. For instance, in the event of acquittal of the accused in a complaint case, the complainant gets a right of appeal under Section 378(4). It is now well-settled that when a petition of complaint is filed before a Magistrate, the question whether he can be said to

Cri LJ 2031 (P&H).

7. *GopalMarwari* v. *Emperor.*, (1944) 45 Cri LJ 177: AIR 1943 Pat 245, 251; see also, *R.R. Chari* v. *State ofU.P.*. (1951) 52 Cri Lj 775, 777: AIR 1951 SC 207, 210; *Ajii Kumar Palit* v. *State* o/^5(1963)
8. *Pitambar Buhan* v. *State of Orissa,* 1992 Cri LJ 645 (Or I); *also see,* observations in *Ami Saran* v. *State of Bihar,* (1995) *6* SCC
9. *Cbinnaswami* v. *Kuppuswamy,* (1955] 56 Cri Lj 1264: AIR 1955 Mad 534.
10. (2012] 3 SCC 126: (2012] 2 SCC (Cri) 69.
11. *Ibid,* 71.
12. *See supra,* para. 8.5.

have taken "cognizance" of the offence alleged in the complaint under Section 190(1) depends upon the purpose for which he applies his mind to the complaint. If the Magistrate applies his mind to the complaint for the purpose of proceeding with the complaint under the various provisions of Sections 200 to 203 (dealing with examination of complainant, postponement of issue of process, etc.), he must be held to have taken cognizance of the offences mentioned in the complaint; on the other hand, if he applies his mind to the complaint not for any such purpose, but only for the purpose of ordering an investigation under Section 156(3) of the Code, or for issuing a search warrant under Section 93, he cannot be said to have taken cognizance of the offence.[13]

It is worth noting that in *Moti Lai Songara* v. *Prem PrakasK*[4], the Supreme Court had occasion to deal with the order of Additional Chief judicial Magistrate's taking cognizance of the offences on the basis of the information given by the informant to him. In this case the Magistrate on a complaint by the informant got an FIR registered and investigated. After this the informant prayed for including one more person as accused. The Magistrate acceded to this prayer and the Sessions Court framed charges. The Supreme Court approved the Magistrate's taking cognizance of the offence in the facts of the case.

On receiving a complaint the Magistrate *may* take cognizance of the offence and examine the complainant on oath under Section 200[15] or, instead of taking cognizance of the offence, may order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(2). On receiving the police report the Magistrate may take cognizance of the offence under Section 1<jo(i)(b) and straightway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The Magistrate is not bound by the conclusions drawn by the police, and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. It has been reiterated that the Magistrate does not have power to call upon the police to submit a chal- lan when they have sent a report that there is no case made out for sending up an accused for trial. The Magistrate has, however, power to /) reject

13. *Jamuna Singh* v. *Bhadai Shah,*

14. (2013) 9

15. *Nit in im*

the police report and direct an inquiry under Section 202 and after such an inquiry to take action under Section 203, or *ii)* he can take cognizance under Section 190 at once if he disagrees with the police report* He has also the power to have inquiry under Section 200.[16 17] The Magistrate after receiving the police report, may, without issuing process or dropping the proceedings, decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200 and thereafter, decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and, therefore, the Magistrate will not be barred from proceeding under Sections 200, 203 and 204.[16 17]

It has been explained that the Magistrate while taking cognizance of an offence, is becoming aware of the commission of that offence and that awareness continues. So a Magistrate would be entitled to take cognizance of a complaint case after having taken cognizance of the case on police report. It has also been opined that even if this involved taking cognizance twice, there is no harm as no provision in the Code prohibits it.[18]

However, it is settled that a court can take cognizance of an offence only once and after that it becomes *functus officio.* There could be no recall of an order taking cognizance. But such order could be got quashed.[19] This came to be reiterated by the Rajasthan High Court[20] which explained the position thus:

> The position may be different if during the pendency of the private complaint before the Magistrate it is brought to his notice that in respect of the same offence a police case has also been registered. The Magistrate in that case may call the report from the police and proceed under Section 210. Similarly, if a police report under Section 173 CrPC and a private complaint are filed simultaneously, the Magistrate may pass appropriate order of issuing process against the person not challaned by the police provided he has not become *functus officio* insofar as his powers under Section 190 CrPC are concerned.[21]

16. See, *Vasan*
17. *H.S. Bains* v. *State (L'T of Chandigarh),* {1980) 4 SCC 631:
18. *Kesavan Natesan* v. *Madhavan Peethambharan,* 1984 Cri LJ 324
19. See, *Bholu*
20. *Ibrahim Khan* v. *State.* 1999 Cri LJ 2614 (Raj); *Hiralai* v. *State of*
21. *Ibrahim Khan* v. *State,* 1999 Cri LJ 2614 (Raj).

If cognizance is to be taken on a police report under Section 190(1)(b), the report must be one as defined in Section 2, clause *(r).* That is, the report must be one forwarded by a police officer to a Magistrate under Section 173(2), and not any other report like preliminary report or an incomplete challan. And it is for the Magistrate to decide whether the police report is complete. His power cannot be controlled by the investigating agency.[22] The Magistrate's power to take cognizance may not be impaired by territorial restrictions either.[23]

On receiving the police report the Magistrate *may* take cognizance of the offence under Section 190(i)(h) and straightway issue a process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not.[24] The Magistrate has not to proceed mechanically in agreeing with the opinion formed by the police, but has to apply his mind and peruse the papers placed before him. He has to apply his mind to all the details embodied in the police report in accordance with the provisions of Section *ij^A{z)(i){a)* to (g), and to other documents and papers submitted by the police along with the report.[25] And the Magistrate's order taking cognizance should reflect application of his mind.[26] It may be noted that the Magistrate takes cognizance of the offence and not of the offender.[27] The Magistrate is not bound by the conclusion drawn by the police and it is open to him to take cognizance of an offence under Section 190(i)(h) on the basis of the police report, even though the police might have recommended in their report that there was no sufficient ground for proceeding further or that it was not a fit case where cognizance should be taken by the Magistrate.[28] The Magistrate's power includes the power to take cognizance of such persons who have not been alerted by the police as accused persons if it appears from the evidence that they were *prima facie* guilty of the offence alleged to have been committed.[29] The Andhra Pradesh High Court has ruled that there

22. *State of Maharas*
23. *Trisuns Chemical Industry*
24. *Harihar Chaitanya*
25. *Mohan La!* v. *State of Rajasthan,* 1985 Cri Lj 1918
26. *Arvindbhai*
27. *State of W.B. v. Ram*
28. *Adhar* v. *State,* 1981 Cri Lj 1321,1322 (All); *Zalam Singh* v.
29. *Rajinder Prasad* v.

is no bar for taking cognizance after examination of the witnesses.[30] It has been ruled that the Magistrate can take cognizance of an offence if he is satisfied about the material. It is trite that before taking cognizance the court should satisfy that the ingredients of the offences charged are there.[31] Cognizance on reading case diary entries was thus held valid.[32]

According to Section 190(i)(c) the Magistrate can take cognizance of any offence upon information received from any person other than a police officer or upon his own knowledge.[33] The object of this provision is to enable a Magistrate to see that justice is vindicated notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute. Hence, the proper use of the power conferred by this provision is to proceed under it when the Magistrate has reason to believe the commission of a crime, but is unable to proceed in the ordinary way owing to absence of any complaint or police report about it. Therefore, the word "knowledge" as used in the abovementioned clause (c) should be interpreted rather liberally so as to subserve the real object of the provision. The Magistrate can derive his knowledge of the offence from any source and it is not necessary that the knowledge must be derived by ocular seeing of the event.[34]

It has been opined that if a Magistrate takes action under Section 190(1)

(c) without having jurisdiction, such a trial would be vitiated.[35]

Section 190 provides that under the condition specified in the section certain Magistrates *may* take cognizance of offences. It has at times been argued in court and the argument accepted that despite the use of the word "may" a Magistrate is bound to take cognizance of an offence if there is before him a proper complaint, or a proper police report.[36] At other times it has been observed that a Magistrate has ample discretion in this respect and if on looking at a police report he finds that there has not been a thorough investigation he can, without taking cognizance, order further investigation. Considering the observations of the Supreme Court in this connection it may be fairly concluded that a Magistrate has certain discretion in this connection but as this discretion is judicial in nature, it is limited in its scope and that is how it should be.[37]

30. *Vidavaluru Bataramatab* v. *State of A.P.,* 2003 Cri LJ 3192 (AP).
31. *Gouiam Sahu* v. *State of Orissa,* 1999 Cri Lj 838 (Ori).
32. *Mobd. Rafq* v. *State of Bihar,* 1990
33. *Annapurna Jena* v.
34. *Raju* v. *State of Rajasthan,* 1980 Cri LJ 896, 900, (Raj).
35. *Harekrishna Sahu* v. *State of Orissa,* 1986 Cri LJ 691 (Ori).
36. *Sampat Singh* v. *State of Haryana,* (1993) 1 SCC 561, 565: 1993 SCC (Cri) 376.
37. *See,* observations in 41st Report, p. 104, para. 15.79; see also, *R.R. Chari* v. *State ofU.P.,* (195 r) 52 Cri LJ 775: AIR 1951 SC 207; *Gopal Das*

The taking of cognizance under Section 190 does not depend upon the presence of the accused in the court.[38] In fact he does not have any role at this stage.[39] There is no question of giving him a hearing when final report of the police is being considered. Nor does refusal to take cognizance of the offence amounts to discharge of the accused.[40]

Under Section 190 the Magistrate takes cognizance of an offence made out in the police report or in the complaint, and there is nothing like taking cognizance of the offenders at that stage. As to who actually the offenders involved in the case might have been has to be decided by the Magistrate after taking cognizance of the offence.[41]

It may be noted here that a Magistrate can take cognizance of any offence only within the time-limits prescribed by law for this purpose.[42] Sections 467 to 473 deal with the provisions relating to the periods of limitation generally, while Section 468(2} prescribes the periods of limitation for taking cognizance of certain categories of offences. Even after the period of limitation such offences can be taken cognizance of by the court if the delay is condoned prior to taking cognizance.[43] In view of Section 473 a court can take cognizance of an offence not only when it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained, but even in absence of proper explanation if the court is satisfied that it is necessary to do so in the interests of justice.[44] But the delay should not be condoned without notice to the accused and behind his back and without recording any reasons for the condonation of the delay.[45]

The power to take cognizance of an offence may not be confused with the power to inquire into or try a case. A court, for instance, a Sessions Court, may have power to try a case but not to take cognizance of the offence; on the other hand a Magistrate may have power to take cognizance of an offence but not to inquire into or try the case. It is clear from

38. *State of*
39. *Laxmi Kishore Tonsekar v. State of*
40. *Hanuman Singh*
41. *Ha*
42. *Shyam Sunder*
43. *Kat*
44. *Vanka Radbamanohari* v.
45. *State of Maharash tra* v. S.V.

Section 190 itself that the power of a Magistrate to take cognizance of an offence is not dependent upon his power to try it.[46] [47] [48]

Cognizance taken by a Magistrate not empowered

10.2

If any Magistrate not empowered to take cognizance of an offence under clauses *(a)* and *{b)* of Section 190(1}, does erroneously in good faith take cognizance of an offence under any such clause, his proceedings shall not be set aside merely on the ground of his not being so empowered.[47] [48] If a Magistrate takes cognizance of an offence and proceeds with a trial, though he is not empowered in that behalf, and convicts the accused, the accused cannot avail himself of the defect and cannot demand that his conviction be set aside merely on the ground of such irregularity, unless there is something on the record to show that the Magistrate had assumed the power not erroneously and in good faith, but purposely having knowledge that he did not have any such power.[4S]

On the other hand, if a Magistrate who is not empowered to take cognizance of an offence takes cognizance upon information received or upon his own knowledge under clause (c) of Section 190(1), his proceedings shall be void and of no effect.[49] In such a case it is immaterial whether the Magistrate was acting erroneously in good faith or otherwise.

Transfer of cases after taking cognizance

10.3

(a) Transfer on application of the accused.—Section 191 provides:

191. When a Magistrate takes cognizance of an offence under clause (c) of subsection (1) of Section 190, the accused shall, before any evidence is taken, be informed that he is entitled to have the case inquired into or tried by another Magistrate, and if the accused or any of the accused, if there be more than one, objects to further proceedings before the Magistrate taking cognizance, the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf. [S. 191]

Transfer on application of the accused

Since clause (c) of Section 190(1) contemplates the possibility that cognizance of an offence may have been taken by a Magistrate because of his own knowledge or his own information, the accused must be told "before any evidence is taken" that he is entitled to have the case tried by another court, and if he so chooses "the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf'. This rests on the view that administration of justice should

46. *Chauthmal v. State of Rajasthan,* 1982. Cri Lj 1403, 1410 (Raj).

47. See, S. 460, cl. (e).

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49. See, S. 4L1, cl. *{k}.*

always appear to be unbiased.[50] The section, by giving the accused person in such a case the right to claim to be tried before another Magistrate, would in a way inspire confidence in the administration of justice. Failure to tell the accused of his right to be tried by another Magistrate vitiates the trial,[51] and this illegality would not be cured by Section 465C[52] Further the refusal of the accused person's request for transfer in such a case is illegal.

(b) Power of the Chief Judicial Magistrate to transfer a case.— Section 192(1) provides that "any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him". The section enables the Chief Judicial Magistrate to distribute the work for administrative convenience. This section has conferred special power on the Chief Judicial Magistrate, as normally the Magistrate taking cognizance of an offence has himself to proceed further as enjoined by the Code. But an exception has been made in the case of Chief Judicial Magistrate, may be because he has some administrative functions also to perform.[53] This transfer can be ordered only after taking cognizance by the transferring Magistrate.[54] The object of the section is to enable Senior Magistrates to transfer cases. When a Magistrate transfers a case under Section 192, it is not an administrative order. It is a judicial order inasmuch as there should be application of mind by the Magistrate before he passes the order,[55] look at most of the cases in the first instance but after taking cognizance send them for disposal to their subordinates.[56] The Chief Judicial Magistrate has also a general power of transfer under Section 4x0(1).

(c) Magistrate empowered to transfer a case.—**According to Section 192(2):**

192. {2} Any Magistrate of the first class empowered in this behalf by the *Making wer ofcases t°* Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify, and thereupon such Magistrate may hold the inquiry or trial.

This sub-section enables the Chief Judicial Magistrate to clothe a First Class Magistrate with powers like his own under Section 192(1), This again is useful in order to relieve the Chief Judicial Magistrate of unnecessary

50. 41st Report, p. 105, para.
51. *Dulicband* v. *State,* AIR 1971 A&N 14:
52. For the text of S. 465 , *see*
53. *Anil Saran* v. *State*
54. *Kkudiram* v. *State,* (1953) 54 Cri LJ 1355: AIR 1953 Cal
55. *Ram Ekabal*
56. 41st Report, p. 105, para.

burden.[57] It may be noted here that Section 410(2) empowers a Judicial Magistrate to recall a case made over by him to any other Magistrate under Section 192(2) and then to inquire into or try such case himself.

Cognizance of offences by Court of Session

10.4

Except as otherwise provided by the Code or by any other law, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. [S. 193] When an offence is exclusively triable by a Court of Session according to Section 26 read with the First Schedule, the Magistrate taking cognizance of such offence is required to commit the case for trial to the Court of Session after completing certain preliminary formalities. [See, S. 209]

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 according to the Kerala High Court invested with the special judge—Sessions judge—the power to take cognizance of the offences under it instead of the Magistrate.[58] According to this view Section 193 CrPC was not applicable and the special judge could initiate steps without the case being committed to it by the Magistrate.

This view came to be dissented from by the Andhra Pradesh High Court[59] which followed the rulings of the High Courts of Punjab and Haryana, Allahabad, Madhya Pradesh and Patna and reasoned thus:

> If the Special Court ceases to be a Sessions Court, and the provisions of CrPC such as Sections 220, 223 etc. do not govern the trials in a Special Court, then IPC offences cannot be tried at all along with the offences under the Act. This will lead to an anomalous and unintended results.[60]

Sometimes the posts of Chief Judicial Magistrate and Additional District Judge are held by one individual. In such a case the Chief Judicial Magistrate is required to take cognizance and try economic offences. It was ruled that Section 193 did not apply to that case.[61]

The Supreme Court was presented with an interesting question in *Rattiram* v. *State of* M.P.[62] as to the validity of a trial by Sessions Court under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Overturning the ratio of *Moly* v. *State of Kerala*[63]

57. *Ibid.*
58. DG of Prosec
59.
60. *Ibid,* 4186.
61. *Ponn*
62. (2012) 4 SCC 516: (2012) **2** SCC (Cri) 481: 2012 Cri LJ 1769.
63. (2004) 4 SCC 584: 2004 SCC (Cri) 1348: 2004 Cri Lj 1812.

and *Vidyadbaran* v. *State of Kerala*[64], the court followed *State of M.P.* v. *Bbooraji*[65]. The latter held that the trial of such an offence, though not committed, may not be vitiated inasmuch as there is no failure of justice under Section 463. It is for the accused to prove failure of justice.[64 65 66]

It will be noticed that both under Sections 193 and 209 the commitment is of "the case" and not of "the accused". It has also been clarified that "case" in Sections 173 and 209 should mean "the case in respect of the offence qua those accused". It indicates the particular case and not the entire case relating to a particular offence.[67] And once the Sessions Court is properly seized of the case as a result of the committal order against some accused, the power under Section 319(1) can come into play and such court can add any person, not an accused before it, as an accused and direct him to be tried along with the other accused for the offence which such added accused appears to have committed from the evidence recorded at the trial.[68]

Proceedings under Section 319 can be initiated upon reaching evidence collection. In other words, the Sessions Court under Section 319 may add any person to the array of accused after collecting some evidence.[69] It can also be invoked in the case of an accused who had been discharged in the critical stage of the case.[70 71 72 73 74 75]

10.4.1 *Summoning before committal to Sessions Court*

The questions regarding the Sessions judge's power under Section 193 CrPC to summon the accused exonerated by the police in their report, without taking further evidence, have now been answered by a five-member Bench of the Supreme Court in *Dbaram Pal* v. *State of Haryana*[71 72 73]. The conflicts that arose out of *Kishori Singh*[7'-, *Rajinder Pra$ad*[7\ *Kishun Singh*[74 75] and *Ranjit Singh*[75] have now been resolved by this decision.

64. {2.004} r SCC 2.15: 2004 SCC (Cri) 260: 2004 Cri Lj 605.
65. (2001) 7 SCC 679: 2001 SCC {Cri} 1573: 2001 Cri Lj 422S.
66. *Rattiram* v. *State of M.P.*, (2012} 4 SCC 516: (2012) 2 SCC
67. *Kesavan Natesan v. Madhavan Peethambharan,*
68. *Joginder Singh* v. *State of Punjab,* (1979} 1 SCC 345: 1979 SCC (Cri) 295, 301:
    1979 Cri Lj 333; see also, *State of Punjab* v. *Wassan Singh,* 1984 Cri LJ 8S9 {PScH}; *Shamim Ahmad Khan* v. *State of Biha7,*
69. *Ranjit Singh* v. *State of Punjab,* {1998) 7 SCC 149: 1998 SCC (Cri) 1554 wherein the Supreme Court reviewed its earlier decisions in *Kishun Singh* v. *State of Bihar,* (1993} 2 SCC 16: 1993 SCC (Cri) 470: X995 Cri Lj 1700; *Nisar* v.
70. *Rama Sharma* v. Pinki *Sharma,* 1989 Cri LJ 2153 (Pat).
71. (2014} 3 SCC 306.
72. *Kishori Singh* v. *State of Bihar,* (2004) 13 SCC 11.
73. *Rajinder Prasad* v. *Bashir,* (2001) 8 SCC 522.
74. *Kishun Singh* v. *State of Bihar,* (1993) 2 SCC 16.
75. *Ranjit Singh* v. *State of Punjab,* (1998) 7 SCC 149.

The position emerging from this decision could be explained as follows: The Magistrate has a role to play while committing the case to the Sessions upon taking cognizance on the police report submitted before him under Section 173(3) CrPC. In the event of the Magistrate's disagreeing with the police report, he has two options. He may act on the basis of a protest petition that may be filed, or he may while disagreeing with the police report issue process against the accused. Then if he is satisfied that a case has been made out against persons exonerated by the police, he can proceed to try such persons; or if he was satisfied they are triable by the Sessions Court, commit the case to it. In taking that decision he can rely on the police report itself.

On committal the Sessions Court shall have all the powers under Section 209 CrPC. In sum, even without recording evidence, the Sessions Court under Section 209 could summon even those not named as accused by the police but whose complicity in the crime would be evident from the materials on record.

For proper distribution of the work in the Court of Session and for administrative convenience, it has been provided that an Additional Sessions judge or Assistant Sessions judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try. [S. 194]

Limitations on the power to take cognizance

10.5

Sections 195 to 199 are exceptions to the general rule that any person having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence.[76] [77] [78] These sections, for sound policy considerations, impose limitations on the unfettered powers of Magistrates to take cognizance of offences under Section 190.[77] [78] Therefore, at the stage when the Magistrate is taking cognizance under Section 190 he must examine the facts of the complaint before him and determine whether his power of taking cognizance under Section 190 has or has not been taken away by any of the clauses of Sections 195 to 199.[75] The analysis of these sections would bring out the following limitations on the power to take cognizance of an offence:

(1) *Prosecution for contempt of lawful authority of public servants*.— According to Section 195(1)(a), no court shall take cognizance

76. *Ganesh Narayan Sathe, re,* ILR (1890) 13 Bom

77. *Govind*

78. *Gov*

(*) of any offence punishable under Sections 172 to 188 IPC, or *(ii)* of any abetment, or attempt to commit such offence, or *(Hi)* of any criminal conspiracy to commit such offence, except on the complaint in writing of the court or by such officer of the court as the court may authorise in writing or of some other court to which that court is subordinate.

Section 195 came to be amended as above to clarify the scope of the section which deals with prosecution for three different categories of the offences: contempt of lawful authority of public servants, offences against public justice and some offences relating to documents given in evidence.[79]

It has been further provided by Section 195(2) that where such a complaint has been made by a public servant, any authority to which he is administratively subordinate may order the withdrawal of the complaint and sent a copy of such order to the court; and upon its receipt by the court, no further proceedings shall be taken on the complaint. However, any such withdrawal shall not be ordered by the authority if the trial in the court of the first instance has been concluded.

Sections 172 to 188 IPC referred to above relate to offences of contempt of lawful authority of public servants; for instance, absconding to avoid service of summons, preventing service of summons, not obeying the legal order of the public servant to attend, not producing a document when so required by a public servant, intentionally omitting to give notice or information to a public servant, knowingly furnishing false information, refusing to take oath, etc.

The section is mandatory and a private prosecution in respect of the abovesaid offences is absolutely barred. Only the concerned public servants can make complaints and initiate proceedings in respect of these offences. And it is necessary that the public servant initiate action in the court rather than with the police.[80] The object of imposing this limitation is to save the accused from vexatious or baseless prosecutions prompted by vindictive feelings on the part of the private complainants. The expression "public servant concerned" in Section 195(1)^ includes the person holding the office of the public servant for the time being. The power to make the complaint conferred by Section 195 (i){12) is not a personal authority or privilege, but it can be exercised by the public servant who for the time being holds the same office or is a successor-in-office of the public servant whose order is disobeyed or lawful authority is disregarded and thus offence is committed under Sections 172 to 188 IPC.[81]

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It may be noted that according to Section *z{c)* and *(l)* read with the First Schedule all the offences covered by the abovesaid Sections 172. to 188 IPC except the one under Section 188, are non-cognizable offences. However, even in case of Section 188, the statutory requirement for taking cognizance is equally applicable and the Magistrate can take cognizance only upon the complaint in writing of the public servant concerned (whose authority has been defied) or of some other public servant to whom he is administratively subordinate.[82]

Section 195 being imperative in nature, cognizance of any offence referred to therein without a proper complaint by the concerned public servant is an illegality not curable by Section 465.^ It has been observed that the provisions of Section 195 cannot be evaded by resorting to devices or camouflage. For instance, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply, and then convicting him of an offence to which it does.[84 85] However, when a single act of the accused is of such a character as to amount to two distinct offences, one which is covered by Section 195(1) *(a)* and the other which is not, it is open to the person aggrieved thereby to lodge a private complaint of the latter offence, and cognizance of that offence under Section 190 is not barred by the operation of Section 195(1) *{a).* To hold otherwise would amount to legislating and adding very materially to the language of that section which, it is submitted, would not be permissible while interpreting the provision. It may, however, be noted that where offences are so intermingled with each other that it is impossible to separate them for trial in respect of any particular offence which does not attract the provisions of Section 195(1), it is not open to a court to proceed with the trial of some offences only by dropping charges for other offences attracting that section.[83]

(2) *Prosecution for offences against public justice*.—In respect of any offence punishable under any of the following sections of the IPC, namely, Sections 193 to 196 (giving or fabricating false evidence), Section 199 (false statement made in any declaration), Section 200 (using as true a false declaration), Sections 205 to 211 (false personation, fraudulent removal [82 83 84 85]

82. *See,* the observations in *Tef Singh* v. *State,* 1976 Cri Lj 92.2, 923 (J&K).

83. *Janki Prasad* v. *Emperor,* (1926) 27 Cri Lj 901: AIR 1926 All 700;
Tularam Marwadi v. *Emperor, (1917}* 28 Cri

84. *Dur4achar an Naik* v. *State off*

85. *Basappa* v.

or concealment etc., of property to prevent its seizure in legal process, claiming property without right to prevent its seizure, fraudulently suffering a decree to pass for a sum not due, false claim in a court of justice, fraudulently obtaining a decree for a sum not due, false charge of offence), no court shall take cognizance of any such offence or of any criminal conspiracy or attempt to commit any such offence, or of the abetment of any such offence when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, except on the complaint in writing of that court or of some other court to which that court is subordinate. [Cls, *(i)* and *(Hi)* of S. i95(i){fi}]

Here the term "court" means a civil, revenue, or criminal court and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a court for the purposes of Section 195 of the Code. [S. 195(3)] [A] das been held that in view of Section 34(2) of the U.P. Urban Buildings {Regulation of Letting, Rent and Eviction) Act, 1972, the Rent Control Officer shall be deemed to be a civil court within the meaning of Sections 345 and 346 for the purposes of Section 193 IPC, and therefore shall be deemed to be a civil court for the purposes of Section But a commission appointed under the Commission

of Inquiry Act, 1952 was held not to be a court for the purposes of Section i95(i)(h).[87]

For the purpose of determining to which other court a court is subordinate, it has been provided by Section 195(4) that [a] court shall be deemed to be subordinate to the court to which appeals ordinarily lie from the appealable decrees or sentences of such former court, or in case of a civil court from whose decrees no appeal ordinarily lies, to the principal court having ordinary original civil jurisdiction within whose local jurisdiction such civil court is situate. However, it is further provided that where appeals lie to more than one court, the appellate court of inferior jurisdiction shall be the court to which such court shall be deemed to be subordinate; and where appeals lie to a civil and also to a revenue court, such court shall be deemed to be subordinate to the civil or revenue court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed. [S. 195(4)]

The underlying purpose of enacting Section i95(i)(&) and Sections 340 to 343 seems to be to control the temptation on the part of private parties considering themselves aggrieved by the offences mentioned in those sections to start criminal prosecutions on frivolous, vexatious or insufficient grounds inspired by a revengeful desire to harass or spite their opponents.[86 87 88]

86. *Chandrapal*
87. *Baliram*
88. *See,* observations

These offences have been selected for the court's control because of their direct impact on the judicial process. As the purity of the proceedings of the court is directly sullied by these crimes, the court is considered to be the only party entitled to consider the desirability of complaining against the guilty party. The private party designed ultimately to be injured through such an offence is undoubtedly entitled to move the court for persuading it to file the complaint. But such party is deprived of the general right recognised by Section 190 of the aggrieved parties directly initiating the criminal proceedings.[89] It has been held that a court cannot correct its decision which became the subject-matter of Section 340 proceedings.[90] The Punjab and Haryana High Court has ruled that the bar against initiation of proceedings in this section included investigation also.[91 92 93]

This salutary rule of law requiring the complaint of the court concerned for the purpose of taking cognizance of any of the abovementioned offences is founded on common sense. The purpose of the section is to bar private prosecutions where the course of justice is sought to be perverted, leaving it to the court itself to uphold its dignity and prestige.[92 93]

> This salutary rule of law is founded on common sense. The dignity and prestige of courts of law must be upheld by their presiding officers, and it would never do to leave it to parties aggrieved to achieve in one prosecution gratification of personal revenge and vindication of a court's honour and prestige. To allow this would be to sacrifice deliberately the dispassionate and impartial calm of tribunals and to allow a court's prestige to be the sport of personal passions.[95]

The abovestated rule contained in Section i95(i)(^?)(f) does not provide for any particular type of relationship existing between the offences enumerated therein and the proceedings in court. All that is necessary is that the relationship between the alleged offences and the proceedings must be effective and proximate and not remote, artificial, unnatural and unrealistic.[94]

The proceedings contemplated by the abovesaid Section 195(1 *}(b){i)* need not necessarily be in existence on the date when cognizance is sought to be taken of any offence referred to in the said clause of Section ipyTHfi); the proceedings might have been concluded before the date on w[T]hich cognizance is sought to be taken of any such offence in relation to such proceedings in court.[95] The words "any proceeding" are words of amplitude

89. *Patel Laljibhai Sotnabhai* v. *State of Gujarat,* (1971} 2 SCC 376: 19/I SCC (Cri) 548. 554: 1971 Cri Lj 1437; see also, ***Aseezuddin*** v.
90. ***Laxm***i ***Devi*** v. ***Tej*** Pam. 1991 Cri LJ 1931 (Del) .
91. *Sardul Singh* v. *State of Haryana*, 1992. Cri LJ 354 (P&H).
92. 41st Report, p. 109, para. 15,93.
93. ***Rainaswamy Iyengar*** v. ***Pandurang Mudaliar***, (1938) 39 Cr LJ 1: AIR 1938
94. P.C. ***Gupta*** v. ***State***, 1974 Cri LJ 945, 950. 951 (All) (FB).
95. ***M.L. Sethi v. R.P. Kapur***, 1967 Cri LJ 528: AIR 1967 SC 528.

and have no limitations except that the proceedings should be before a court.[96]

Section 195(1X6) requires that the offence under Section 193 IPC should be alleged to have been committed in or in relation to any proceeding in any court. It was, therefore, held that since the forged sale deed was not produced in evidence in any stage of the redemption suit, Section 195(1)(6) was not attracted.[97]

While Section 195(1)16) provides that no cognizance shall be taken of certain offences except on a complaint by the court concerned, Section 340 lays down what procedure the court concerned should adopt when any such offence appears to have been committed. Section 340 reads as follows:

Procedure in cases mentioned in Section 195

340. (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry
should be made into any offence referred to in clause (6) of sub-section (r) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,—

{a} record a finding to that effect;

(6) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks
it necessary so to do, send the accused in custody to such Magistrate; and

{e) bind over any person to appear and give evidence before such Magistrate.

(a) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.

(3) A complaint made under this section shall be signed,—

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(6) in any other case, by the presiding officer of the Court [98][or by such officer of the Court as the Court may authorise in writing in this behalf.]

(4) In this section, "Court" has the same meaning as in Section 195.

Section 195(1X6) creates a bar and Section 340 confers jurisdiction on the

96. *P.C. Gupta* v. *State,* 1974 Cri Lj 943, 950, 951 (All)

97. *State of Karnataka* v. *Hemareddy,* (1981) z SCC 185: 1981 SCC (Cri) 395: 1981 Cri Lj 1019; see also,

98. *Ins.* by Act 2 of 2006, S. *6* (w.e.f. 16-4-2006).

sections are supplementary to each other. One creates a bar on the filing of the complaint by all and sundry and the other lays down the procedure as to how the bar is to be removed and such complaint is to be made. The court may proceed to make a complaint either on its own motion or on the application of any person; but in every case the court must satisfy itself that an offence under Section 195(1 *)(b)* "appears to have been committed" and that it is expedient in the interests of justice that an inquiry should be made.[1] Consequent upon the amendment made to Section 195, Section 340 has also been amended in 2006 making it possible for an officer authorised by the court to file complaint. Earlier the Presiding Officer alone was entitled to make the complaint.[2] The court is expected to exercise the powers given under this section with great care and caution, and it should not make a complaint unless there is a reasonable probability of conviction and a reasonable foundation for the charge.[3] Like all other criminal trials or proceedings, the existence of mens rea or the criminal intention behind the act as complained of, will also have to be looked into and considered, before any action under Section 340 is recommended.[4]

In prosecuting a person for giving false statement, the gravity of the false statement, the circumstances under which such statement is made, the object of its making and tendering to impede and impair the normal flow of the course of justice are matters to be considered by the court.[5] Also, there can be no perjury unless the accused has on oath, stated facts on which his first statement was based and then denied these facts on oath on a subsequent occasion.[6]

Any person on whose application the court has refused to make a complaint under Section 340, or any person against whom such a complaint has been made by such court, has a right of appeal under Section 341. Section 342 empowers the court to order costs, while Section 343 lays down the procedure for taking cognizance by a Magistrate on a complaint made to him under Section 340 or 341. Sections 341, 342 and 343 are as follows:

341. (1) Any person on whose application any Court other than a High Court has refused to make a complaint under sub-section (1) or sub-section (2) of

Appeal

1. See, discussions in X. *Kama Krishnan* v. *S.H.O., Police Station,1986* Cri
2. *See,* S. *340(3}:s} inserted* by Criminal Law (Amendment) ./Act, 20 05 (No. 2 of 2006).
3. *Narain Singh* v. *Emperor,* (1948) 49 Cri Lj 361: AIR 1948 Ali 287; *Jadu Nandan Singh v. Emperor,* ILR (1910) 37 Cal
4. Bibh *uti Bhusan Basu* v. *Corpn. of Calcutta,* 19 82 Cri LJ 909 (Cal).
5. *Kuriakose* v. *State of Kerala,* 1994 Supp (1} SCC
6. T. *Bhagi Patra* v. *State of Orissa,* 1996 Cri Lj 2423 (Ori).

Section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub-section {4) of Section 195, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint, or, as the case may be, making of the complaint which such former
Court might have made under Section 340, and if it makes such complaint, the provisions of that section shall apply accordingly.

{2.} An order under this section, and subject to any such order, an order under Section 340, shall be final and shall not be subject to revision.

Though an order passed in appeal under this section is not revisable by the High Court under Section 397(2), the High Court is entitled to examine the matter under Section 482 which expressly overrules the bar con- [tai]342 [i]JA^ 'CSfflrtSdaling with an application made to it for filing a complaint under Section 340 or an appeal under Section 341, shall have power to make such order as to costs as may be just.

343. (x) A Magistrate to whom a complaint is made under Section 340 or 341 shall, notwithstanding anything contained in Chapter XV, proceed, as far as may be, to deal with the case as if it were instituted on a police report.

(2) Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage, adjourn the hearing of the case until such appeal is decided.

Procedure of Magistrate taking cognizance

Chapter XV of the Code referred to in Section 343(1} deals with procedure to be followed by a Magistrate taking cognizance of an offence.

(3) *Prosecution for offences relating to documents given in evidence.*—No court shall take cognizance of any offence prescribed in Section 463 (definition of forgery), or punishable under Section 471 (using as genuine a forged document), Section 475 or Section 47b (counterfeiting device or mark used for authenticating valuable security, etc.) IPC, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court, or of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any such offence, except on the complaint in writing of that court or of some other court to which that court is subordinate. [Cls. *(ii)* and *{Hi}* of S. *195(b))*

Provisions relating to definition of "court", [S. 295(3)] subordination of courts, [S. 195(4)] and procedures in making complaints by courts concerned, [Ss. 340-343] which are applicable in respect of Section 195(1} *{b){i)* as discussed above in "(2) Prosecution for offences against public

/. *Laht Mohan Mondal* v. *Benoyendra Nath Chatterjee,* (1981) 3 SCC 2.19: 1982 SCC (Cri) 697: 198z Cri Lj 625: AIR 1982 SC 785.

justice", are equally applicable here to "prosecution of offences relating to documents given in evidence". These matters being already stated and discussed need not be discussed all over again.

As the court of the Rent Controller was not declared by the Delhi Rent Control Act, 1958 to be a court for the purposes of Section 195, it was held that the Magistrate could take cognizance of the offences under Section 467 or 471 IPC committed in respect of rent receipts produced before the court of Rent Controller without a complaint in writing of that court.[S * *, 8 * 10]

The expression "any offence described in Section 463" refers to all offences of simple forgery or forgery in an aggravated form punishable by Sections 465 to 469 IPC. The mere fact that Section 466 IPC is not specifically mentioned in Section 195(1 *}(b)(ii),* therefore, will not by itself make Section 466 fall outside the ambit of the bar under Section i95(i)(b)(n).[9 10] In the context, an offence punishable under Section 468 IPC would certainly be an offence described in Section 463 IPC and -would be covered by the provisions of Section i95(i)(6)(i/).[30]

The object of this provision is to bar private prosecutions where the course of justice is sought to be perverted, leaving it to the court itself to uphold its dignity and prestige. Further, the principle appears to be that so long as the court before whom the document in respect of which the forgery is alleged to have been committed does not give its own finding in regard to the allegation of forgery, it should not be made possible for another court to entertain a complaint at the instance of a private individual regardless or irrespective of the impressions which the court before whom the document was produced had formed in regard to the allegation. It really intends to obviate the possibility of two conflicting findings being recorded by the two courts.[11]

It is not necessary therefore that any such offence should have been committed after the production of the document before the court. What the section contemplates is the commission of an offence in respect of a document produced or given in evidence in such proceedings. It does not lay down that the offence must have been committed after the production of the document or after the document was tendered in evidence.[12]

S. *Mania Gupta* v. M.S. *Paintal,* 1982. Cri LJ 817, 818 (Del), but for a different approach, see, *Chandrapal Singh* v. *Maharaj Singh,* {1982) i SCC 466: 1982 SCC (Cri) 249, 251982 Cri LJ 1'73'

S. *Dina Nath* v. *Hans Raj,* (1974} 1 Cri Lj 198 (j&K); *Jai Lai* v. *State of V.P.,* 1967 Cri LJ 1121: AIR 1967 All 420; see also. *Vishnu Kumar* (AP).

10. *Ram Pal Singh* v. *State* o/U.P., 1982 Cri Lj 424, 430 (All).

11. *Dina Nath* v, *Hans Raj,* {1974) 1 Cri Lj 198 (J&K); *Jai Lai* v. *State of U.P.,* 1967 Cn Lj TIZI: AIR 1967 All 420; *Har*

12. *Dina Nath* v. *Hans Raj.* (3974) 1 CriLj 19S (j&K); see also, *Vishnu Kumar* v. *State of A.P.,* 1980 Cri Lj 1361 (AP): *Ram Pa!*

However, no complaint in writing by the court for taking cognizance of an offence under Section 471 IPC is necessary in a prosecution for the offence of forgery under Section 471 IPC committed in respect of a document produced or given in evidence in court which was the very subject-matter of that prosecution.[13]

Where a document alleged to be forged was not itself produced in court but a copy only of such document was produced, it was held that the bar created by Section *i$^{A}(ij(b)(ii)* was not operative in respect of the prosecution for the alleged forgery.[14]

According to the Supreme Court Section 195 *(i)(b){ii)* reveals two main postulates for operation of the bar. First is, there must be allegation that an offence described in Section 463 or any other offence punishable under Sections 471, 475 and 476 has been committed. Second, such offence should have been committed in respect of a document produced or given in evidence in a proceeding in a court.

If the forgery was committed while the document was in the custody of the court, then the prosecution can be launched by the court. If on the other hand, forgery was committed with a document which has not been produced in the court, prosecution can be launched by any person. The question often raised is: whether in the latter case production of such a document in the court would make any difference. The Supreme Court, referring to its earlier rulings in *Gopalakrishna Menon* v. *D. Raja Reddy*[15]and *Patel Laljibhai Somabhai* v. *State of Gujarat*[16], resorted to strict interpretation and opined that the bar would apply if the offence had been committed during the time when the document was in *custodia legis.* In other words, according to the court, mere production of the document would not attract the bar of Section 195 *{i){b){ii)*[17] The Rajasthan High Court had occasion to reiterate that bar against initiation of proceedings under Section 195 is not applicable to a case of forgery of documents before their submission to the civil court.[18]

(4} *Prosecution for offences against the State.*—Section 196(1) provides that no court shall take cognizance of any of the following offences

Thakurdas v. *GopichandJodhram,* 1981 Cri LJ 1325 (Bom).

13. *Natesban* v. *State of Karnataka,* 1978 Cri LJ 1642, 1643 (Kant); *Aseezuddin* v. *State of Karnataka,* 1978 Cri LJ 1632 (Kant); see also, *Sanjiu Ratnappa* v. *Emperor,* {1933} 34 Cri Lj 357: AIR 1932 Bom 545.
14. *Sanmukhsingh* v. *R.,* (1950) 51 Cri LJ 651; AIR 1950 PC 31; *Budbu Ram* v. *State of Rajasthan,* (19 S3} 2 Cri LJ 698 (SC); also see, *Harbans Singh* v. *State of Punjab,* 1986 Cri LJ 1834 (P&H); *Ram Narain v. State of Rajasthan,* 1989 Cri LJ 760 (Raj).
15. (1983) 4 SCC 240: 1983 SCC (Cri) 822.
16. (1971} 2 SCC 376: 1971 SCC (Cri) 548, 554: 1971 Cri Lj 1437.
17. *Sachida Nand Singh* v. *State of Bihar,* {1998) 2 SCC 493: 1998 SCC (Cri) *660.*
18. See, *Subhkaran Singh* v. *Kishan Singh,* 2009 Cri LJ 2298 (Raj); *Mahesh Chand Sharma* v. *State ofV.P.,* (2009) 15 SCC 519: (2010) 2 SCC (Cri) 660: 2010 Cri LJ 890.

except with the previous sanction of the Central Government or the State Government:

(a) (i) any offence against the State punishable under Chapter VI
IPC; for instance, waging war against the Government of India,
[S. 121] sedition [S. 12,4-A] etc.;
{ii} promoting enmity between different groups of people; [S. 153-A IPC]
{Hi} deliberate acts outraging the religious feelings of any class; [S. 2.95-A IPC]
(iv) statements conducing to public mischief; [S. 505(1} IPC]
{b) a criminal conspiracy to commit any offence mentioned in *[a]* above; (c) any such abetment as is described in Section 108-A IPC.

The object of this section is to prevent unauthorised persons from intruding in matters of State by instituting prosecutions and to secure that such prosecutions, for reasons of policy, shall only be instituted under the authority of government.[19] Moreover, the offences enumerated therein are of a serious and exceptional nature and deal with matters relating to public peace and tranquillity with which the State Government is concerned. Therefore, provision has been made for obtaining prior sanction of the government before cognizance is taken of any such offence. It is quite possible that in a given case the very filing of a prosecution after tempers have cooled down may generate class feelings which could well be avoided by the government by refusing to accord sanction under Section 196(1). It may equally be possible that the article or writing complained of pertains to a matter falling within the area of social reform and attacks certain dogmas in a general way without intending to outrage the religious feelings of any class of citizens. In such a case if the government is of the opinion that the author of the article or writing has on objective basis attacked certain religious or social dogmas with a view to bringing about social reform, the government may in its discretion refuse to accord sanction because a prosecution based on such an article would throttle free discussion on the subject. It is, therefore, clear that there is an underlying policy which is clearly discernible on a reading of the offences enumerated in Section 196(1) in respect of which prior sanction is a must before cognizance of any such offence can be taken.[20] Section 108-A IPC does not exactly create an offence but only explains that a person abets an offence who in India abets the commission of an act outside India which, if committed in India, will constitute an offence. It is a form of abetment which along with other forms is punishable under different sections of the IPC.

19. *See.* 41st Report, p. 112, para. 15.102.
20. *Shalibbadra Shah* v. *Swami Krishna Bharati,* 1981 Cri LJ 113, 115 (Guj).

The object appears to be to keep under control prosecutions which might impinge on foreign relations in general.[21]

{4-A) Prosecution for offences in respect of publishing matters prejudicial to national integration.—The newly added sub-section (i-A) to Section 196 provides that no court shall take cognizance of any of the following offences except with the previous sanction of the Central Government or of the State Government or of the District Magistrate:

(a) (i) imputations or assertions prejudicial to national integration;

[S.153-BIPC]

[ii) statements creating or promoting enmity, hatred or ill will between classes of people; [S. 505(a) and (3) IPC]

(b) criminal conspiracy to commit any offence mentioned in *{a)* above.

Sanction to prosecute under this section *[i.e.* S. 196] is a condition precedent for taking cognizance of any such offence.[22] Sanction obtained after the filing of the prosecution will not validate the proceedings.[23] Absence of sanction is a basic defect in jurisdiction and therefore not curable.[24] It is now doubtful whether this view would prevail in every such case particularly when the sanction is not totally absent but only irregular. Because Section 465, unlike its counterpart Section 537 CrPC of 1898, provides that no error or irregularity in any sanction for the prosecution shall vitiate the findings of any trial unless such error or irregularity has in fact resulted in failure of justice.[25 26] However, under the present Section 465 omission to obtain sanction for the prosecution will not be a defect curable under that section.

Before according sanction to prosecute for any of the abovementioned offences under Section 196(1) or Section 19G1-A), i.e. offences mentioned in paras. (4) and (4-A) above, the Central Government or the State Government or the District Magistrate, as the case may be, may order a preliminary investigation by a police officer not being below the rank of Inspector. The police officer in such a case shall have the powers referred to in Section 155(3).[27] [S• 196(3)]

21. *See,* 41st

22.

B

23. *Basdeo*

24. *Abdul*

25. For the text

26. *Alfredo*

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The object of such an investigation can only be to enable the competent authority to decide whether it should give sanction under Section 196(1).[25]

Sanction of a prosecution must be expressed with sufficient particularity to indicate clearly the matter which is to be the subject of the proceeding and it should be apparent from the order of sanction that the authority applied its mind to the facts constituting the offence or offences. In according or withholding sanction under the section, the government acts purely in the executive capacity and not in a judicial capacity. The sanction need not be based on any legal evidence nor is it necessary that the authority should give reasons for sanctioning the prosecution or for withholding the prosecution.[28] [29] However, the government being an independent party not connected with the dispute between a complainant and the accused is expected to act fairly and to an objective decision in the matter whenever it is called upon to grant sanction under Section 196(1).[28] [29] [30] If the government withholds sanction arbitrarily, such an act of the government can always be challenged in an appropriate proceeding.[31]

{>) *Prosecution for the offence of criminal conspiracy*.—According to Section 196(2) no court shall take cognizance of any criminal conspiracy punishable under Section 120--B IPC unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings. However, no such consent shall be necessary *i)* if the criminal conspiracy is to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards; or *ii)* if the criminal conspiracy is one to which the provisions of Section 195 apply.

In case of conspiracies covered by Section 195, the complaint of the public servant concerned or of the appropriate court is necessary to initiate the proceedings. In case of other conspiracies which are of a petty nature, it was thought by the legislature that private complaints should not be freely allowed and prosecutions should be instituted only when necessary in the public interest.[32]

Before giving consent for initiating criminal proceedings in respect of any such criminal conspiracy, the State Government or the District Magistrate may order preliminary investigation by a police officer in the same manner as has been mentioned before in respect of offences against State, etc. [S.
196(3)]

Where the complaint shows that some offences distinct from the criminal conspiracy were actually committed in pursuance of such conspiracy, and these offences were such as no sanction or consent was needed to

28. ***See***, 41st Report, p. 116. para. 15.1:14.
29. ***I. Mallikarju-na*** v. ***State*** of A.jP,, 1978 Cri Lj 392., 394 (AP).
30. *Shalibhadra Shah* v. *Svjarni Krishna Bharati*, 1981 Cri Lj 113, *116*
31. *Ibid*.
32. See, 41st Report, p. 115, para. 15.112..

initiate the proceedings, it would be open to the court to take cognizance of such offences, even though they were committed in pursuance of the criminal conspiracy and no consent of the competent authority under Section 196(2) had ever been obtained for the initiation of the proceedings.[33]

(6) *Prosecution of judges and public servants*.—According to Section 197(1}, no court shall take cognizance of any offence alleged to have been committed by a person who is or was a judge or Magistrate or a public servant except with the previous sanction of the appropriate government. In order to attract this rule the section requires that

{i} the judge, Magistrate or the public servant is or was one not removable from his office save by or with the sanction of the government;

(H) the alleged offence must have been committed by him while acting or purporting to act in the discharge of his official duty;

(Hi) the previous sanction for taking cognizance of any such offence must have been given by the Central Government if, at the time of the commission of the alleged offence, the accused person is or was employed in connection with the affairs of the Union; and similarly if the accused person is or was employed in connection with the affairs of a State, such previous sanction would have to be accorded by the State Government.

By way of adding an explanation to Section 197(1) it is now not required to obtain sanction for prosecution of a public servant accused of any offence alleged to have been committed under Sections 166-A, 166-B, 354, 354-A to 354-D, 370, 375, 376, 376-A, 376-C, 376-D or Section 509 IPC,[34] It is also provided by Section 197(4) that the Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which the prosecution of such judge, Magistrate or public servant is to be conducted, and may specify the court before which the trial is to be held.

The object of this legal provision is to enable the more important categories of public servants performing onerous and responsible functions to act fearlessly by protecting them from false, vexatious or *mala fide* prosecutions.[35] But it is equally important to emphasise that the rights of the citizens should be protected and no excesses should be permitted.[36] It is also proper that the protection under the section is needed as much after retirement of the public servant as before retirement. The protection

33. *See,* observati
34. *See,* S.
35. *See,* 41st Report, p. *116,* para.
36. *See,* obse rvatiqn s in

afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint* The ultimate justification for the protection conferred by Section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecutions. It should be left to the government to determine from that point of view the question of expediency of prosecuting any public servant.[37] The purpose of the sanction is to secure a well-considered opinion of a superior authority before the public servant is actually prosecuted before a court.[38]

The power given by sub-section (4) of Section 197 to specify the court need not necessarily be exercised in every case. It is vested on grounds of convenience or the complexity or gravity of the case. It is presumably to ensure that the dignity of high placed government servant is maintained and that he is not compelled to undergo the embarrassment of a trial by junior and inexperienced Magistrates*[39]

In *Matajog Dobey* v. *H.*C. *Bhari*[40], the Supreme Court has held that Section 197(1) is not violative of Article 14 of the Constitution as the discrimination is based on rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard.

Section 197 contemplates a distinction between public servants who are removable only by or with the sanction of the government and those who are removable by some lesser authority* Though delegation by government of the power of removal to some subordinate authority is in a way equivalent to removal by the government through the medium of that authority, it has been held that Section 197 must be interpreted in the light of certain well-known features of the administrative system prevailing in India. It appears to be the policy of the legislature to make the protection under Section 197 available to a limited class of officers and not to all the public servants.[41] [42] [43]

In *R. Balakrishna PiUai* v. *State of Kerala*[41] [42] [43], it was held that by virtue of the provisions in the General Clauses Act, 1897 the expression "Government" used in Section 197 would mean the Governor in the case of a Chief Minister or a Minister. A Minister would be entitled to the protection of Section 197(1) of the Code. Following *B. Saba* v. *M.S. Kocharit* was reiterated that the words "any offence alleged to have been committed by him while acting or purporting to act in the discharge

37. 41st Report, p. 120, para. 15.123.
38. *A.D. Parthasamtby v.J.S. Khurdukar,* 1975 Cri LJ 1290 (AP).
39. 41st Report, p. 120, para. 15.125.
40. 1956 Cri LJ 140: AIR 1956 SC 44.
41. *Afzalur Rahman* v. *King Emperor,* (1948) 44 Cri LJ 466: AIR 1943 FC 18.
42. G996) 1 SCC 478.
43. (1979) 4 SCC 177.

or his official duty", employed Section 197(1) of the Code, are capable of both a narrow and a wide interpretation. If they were construed too narrowly, the section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". At the same time, if they were too widely construed, they will take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is performed or is purported to be performed. The right approach was to see that the meaning of this expression lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection. Only an act constituting an offence directly or reasonably connected with this official duty will require sanction for prosecution. It is the quality of the act that is important and if it falls within the scope of the above quoted words, the protection of Section 197 will have to be extended to the public servant concerned.

The expression "public servant" is not defined in the Code. Therefore, by virtue of clause *(y)* of Section 2, the definition of "public servant" as given in Section 21 IPC will have to be relied upon while determining the meaning of the expression "public servant" as used in Section 197.

In order to attract Section 197 it is necessary that the accused person must have committed the offence while acting or purporting to act in the discharge of his official duty. A "public servant" can be said to act or purport to act in the discharge of his official duty only if his act is such as to lie within the scope of his official duty.[44] If the words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" in Section 197 is construed narrowly, the section will be rendered altogether sterile, for "it is no part of an official duty to commit an offence, and never can be"[45]. Thus, a judge neither acts or purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant if challenged can reasonably claim that what he does, he does in virtue of his office.[46]

44. *See,* discussions in

45. *8, Saha* v. *MS.*

46. *H.H.B, Gill* v.

It is not every offence committed by a public servant which requires sanction for prosecution under Section 197(1) CrPC, nor even every act done by him while he was actually engaged in the performance of his official duties. But if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary and that would be so, irrespective of whether it was in fact a proper discharge of his duties or not.[47] If there is a coherent nexus between the act complained of as an offence and the duty of the public servant, sanction becomes necessary even if the act complained of is in excess of the exact duty of the public servant.[47 48] It has been ruled that the *sine qua non* for the applicability of Section 197 is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him.[47 48 49 50 51] The question whether a particular act is done by a public servant in the discharge of his official duty is substantially one of fact to be determined on the circumstances of each case.[50 51] In a case involving fabrication of false records, for example, the Supreme Court explained that the official capacity only enables the accused to fabricate the record or misappropriate the public funds, etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction.[51]

Some offences cannot by their very nature be regarded as having been committed by public servants while acting or purporting to act in the discharge of their official duty. For instance, acceptance of a bribe (an offence punishable under Section *161* IPC) is one of them and the offence of cheating or abetment thereof is another. Where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant,

47. *Amrik Singh* v. *State of Pepsu,* 1955 Cri LJ 865, 867: AIR 1955 SC 309; see also, *Pbani ndra Chan*
48. *A.D. Parthasarathy* v. *J.S. Khurdukar,* 1975 Cri LJ 1290 (AP); *R.K. Anand* v. *Jogind er*
49. *State (Delhi Admn.)* v. *S*ube Si *ngh,* 1985 Cri LJ 1190 (Del).
50. *Bhagwan Prasad Srivastaua* v. *N.P. Mishra,* (1970) 2 SCC 56: 1970 SCC (Cri) 292: 1970 Cri LJ 1401: AIR 1970 SC 1667.
51.

the official status furnishing only the occasion or opportunity for the commission of the offences*[52] As the sale of adulterated articles of food is prohibited by the Prevention of Food Adulteration Act, a public servant cannot reasonably claim to sell the same in the performance of his duty. He can, therefore, be prosecuted without obtaining any sanction under Section 197 of the Code*[53]

In the course of the investigation of a case of an alleged murder, the investigating police officers assaulted four persons, kept them under wrongful confinement, stripped naked one of them and kept him hanging from a tree. As a result of this ill-treatment two of the persons made false confessional statements. When the police officers were charge-sheeted for offences under Sections 330, 342, 343, 348 IPC, it was contended by them that the acts were done under colour or in excess of their duty. Overruling that contention, the Supreme Court in *State of Maharashtra* v* *Atma Ram*[54] observed:

> The provisions of Sections *161* and 163 of the Criminal Procedure Code emphasize the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot, possibly, be said that the acts complained of, in this case, are acts done by the respondents [the police officers] under the colour of their duty or authority. In our opinion, there is no connection, in this case, between the acts complained of and the office of the respondents [the police officers] and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall completely outside the scope of the duties of the respondents [the police officers].[55]

The law is well-settled that when the facts alleged in the complaint petition disclose primarily an offence to prosecute to which a sanction is necessary, it would not be open to the prosecutor to evade the requirement of sanction by any camouflage or device so as to prosecute the offender under some other section of law not requiring a sanction* It is also well- settled that when a person commits several offences in the course of the same transaction and if the more serious offence requires a previous sanction or a special complaint, it would not be open to the prosecution to ignore the serious charge and prosecute the offender for the less serious charges which do not require a special complaint or previous sanction.[56]

52. *K.*
53. *S.S. Dhano*
54. 1966 Cri LJ 1498:
55. *Ibid, 1767;*
56. N. *Brah*

The section does not prescribe any particular form of sanction, but courts usually insist on being satisfied that the sanctioning authority has applied its mind to the facts of the case before granting sanction, and that the sanction is not arbitrary.[57] It is well-settled that the act of granting sanction is of an executive nature and not a judicial act. It is further well-settled that the satisfaction which the sanctioning authority must have before according sanction is of a subjective character and not of an objective nature.[58] Also there is no need for any hearing before sanction is accorded to prosecute a public servant.[59] The sanction need not specify the offences as precisely as a charge, and the omission to mention a particular section of the law does not seem to preclude the prosecution from proving the relevant facts.[60]

The question of sanction under Section 197 can be raised and considered at any stage of the proceedings. In considering the question whether or not sanction for prosecution is required, it is not necessary for the court to confine itself to the allegations in the complaint and it can take into account all the materials on record at the time when the question is raised and falls for consideration.[61] Even during an inquiry under Section 202 the plea of sanction under Section 197 can be raised by an accused person.[62] In fact there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible for adjudication of the question as to whether in fact Section 197 has any application in the case in hand.[63]

There are two requirements before a public servant engaged in the maintenance of public order is prosecuted for use of excessive force while discharging duties:

(i) He cannot be prosecuted without obtaining sanction to prosecute under Section 132;

(ii) No court can take cognizance of the offence in the absence of previous sanction under Section 197.

57. *See,* 41st Report, p. 119, para. 15.122; see also, *Gokal Cband Dw ark*
58. *D.S. Bhandari* v. *State of Rajasthan,* 1974 Cri LJ 1130, 1133 (Raj); *Rarasnath* v. *State,* (1962} 2 Cri Lj 326: AIR 1962 Bom 205.
59. T.M. *Jacob* v. *State of Kerala,* 1999 Cri Lj 3609 (Ker).
60. *J. Phillips* v. *State,* 1956 Cri LJ 213: AIR 1957 Cal 25; *Jehangir Cama* v. *Emperor,* (1927) 28 Cri Lj 1012: AIR 1927 Bom 501, 503.
61. B. *Saha* v. M.S. *Kochar,* (1979) 4 SCC *lyy:* 1979 SCC (Cri) 939, 944: 1979
62. *Madan Singh* v. R.R. *Basuk,* 1982 Cri Lj 1203, 1205 (Pat).
63. *Suresh Kumar Bhikamchand Jain* v. *Pandey Ajay Bhushan,* (1998) 1 SCC 205: 1998 SCC (Cri) x.

Both these requirements are to be met before a public servant is proceeded against.[64] [65]

Obtaining of government's sanction is a condition precedent for a successful prosecution of a public servant under Section 197 CrPC when the provision is attracted to situation presented in the case. Whether sanction is necessary or not has to be decided from stage to stage of the proceeding. In other words, the question may arise necessarily not at the inception but even at a subsequent stage.[63]

If a public servant has been proceeded against without obtaining valid sanction Section 465 may be invoked to cure the irregularity. Section 465 expressly lays down, inter alia, that any error or irregularity in any sanction for the prosecution shall not be a ground for reversing an order of conviction by the appellate court unless in the opinion of that court a failure of justice has been occasioned thereby.[64] [65] [66]

(7) *Prosecution of members of armed forces.*—It has been provided that no court shall take cognizance of any offence alleged to have been committed by any member of the armed forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government. [S. 197(2,)]

Further the State Government may by notification direct that the above rule shall apply to such class or category of the members of the forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the rule will apply as if for the expression "Central Government"[5] occurring therein the expression "State Government" were substituted. [S. 197(3)]

The expression "Armed Forces of the Union" as occurring in Section 197(a) is not defined. The expression "armed forces" has been defined in Section 132(3)[a]) as meaning the military, naval and air forces, operating as land forces and as including any other armed forces of the Union so operating. That definition, however, is limited in its application, by the express language of that clause itself, to the interpretation of Sections 129 to 132 CrPC. In this situation and in view of Entry 2 in List 1 of the 7th Schedule to the Constitution, the expression must be given its ordinary meaning which would certainly not be limited to the inclusion of only the military, naval and air forces of the Union. Accordingly and in view of Section 3, Central Reserve Police Force Act, 1949, it has been held that the CRPF squarely falls within the expression "Armed Forces of the Union" as used in Section 197(a).[67]

64. *Ram Kumar* v. *State of Haryana,* (1987) *1* SCC 476: 1987 SCC

65. *Om*

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When a member of the armed forces of the Union or the State is deputed for the protection of public property in a State or for other such purposes, it may happen that one or more persons may do or attempt to do something in regard to which such member may be called upon to take action in good faith. Such action may expose him to the possibility of being arrested and prosecuted by the police. To meet such or similar situations, a qualified protection has been given to such member by requiring the previous sanction of the Central Government or the State Government as the case may be, for taking cognizance against any such member.[6S]

The implications of any omission, error, or irregularity in obtaining sanction have been discussed earlier in the light of Section 465 in para. 10.5 (4-A). That discussion is equally applicable here and need not be repeated all over again.

(8) *Prosecution for offences against marriage*.—Section 198(1) provides that no court shall take cognizance of an offence punishable under Chapter XX IPC except upon a complaint by some person aggrieved by the offence.

Chapter XX IPC contains six offences relating to marriage. They are:

(/} deceitful cohabitation by man; [S. 493]

{») bigamy; [S. 494]

{Hi) bigamy with concealment of former marriage; [S. 495]

(iv) fraudulently going through marriage ceremony without lawful marriage; [S. 496]

{v) adultery; [S. 497] and

(in) enticing, etc. a married woman. [S. 498] The rule contained in the above Section 198(1) applies also to the abetment of or attempt to commit any of the offences referred to therein. [S. 198(7)]

The object of Section 198(1) is to prevent strangers from interfering in family life when the aggrieved family members themselves are unwilling to agitate against any alleged wrong. If power is given to persons other than the aggrieved to initiate criminal proceedings in respect of any of the abovesaid offences, there is considerable risk of mischievous intrusion and interference by busy bo dies in private family life.

In order to determine whether a person is aggrieved by any such offence or not, the nature of the offence and the circumstances of the case will have to be taken into account.[68 69 70] A person who is not directly affected or injured by the offence but who alleges only a fanciful or sentimental grievance is not a person aggrieved for the purposes of the section. A petition by the father of second wife of the person accused of bigamy was rejected by the Supreme Court/'[68 69 70]

68. Note on els. 485-486.

69. *Surajmal* v. *Ramnath,* (192.7) 28 Cri L] 996: AIR 1928 Nag 58.

70. *Mani&b Das* v. *State ofU.P., (2006)* 6 SCC 536: (2006} 3 SCC (Cri) 113.

In respect of the offences of adultery [S. 497 IPC] and enticing etc. a married woman, [S. 498 IPC] it has been specifically provided by Section 198(2} that no person other than the husband of the woman shall be deemed to be aggrieved.[71] However, the sub-section further provides that in the absence of the husband, some person who had care of the woman on his behalf at the time of the commission of such offence may, with the leave of the court, make a complaint on his behalf.

Section 198 further provides that certain persons specified below may make a complaint in respect of any such offences in the following exceptional or special circumstances:

{a) Where the aggrieved person is under the age of 18 years, or is an idiot or a lunatic, or is from sickness, or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with leave of the court, make a complaint on his or her behalf. [S. 198(1), proviso *{a)]*

In order to safeguard the rights of the legally appointed guardians in such situations, it has been provided that when in such a case the complaint is sought to be made on behalf of a person under the age of 18 years or on behalf of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the court is satisfied that there is a guardian so appointed or declared, the court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard. [S. 198(3)]

(b) Where the aggrieved person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his commanding officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised as mentioned below, may make a complaint on his behalf. [S. 198(1}, proviso *(b)]*

The abovesaid authorisation *i)* shall be in writing, *it)* shall be signed or otherwise attested by the husband, *Hi)* shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, *iv)* shall be countersigned by his commanding officer, and *v)* shall be accompanied by a certificate signed by that officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband. [S. 198(4)] It is further provided that any document purporting to be such an authorisation and complying with the provisions of Section 198(4) as mentioned heretofore, and any document purporting to be a certificate required by

71. V. *Kevatbi* v. *Union of India,* {1988) x SCC 72.: 1988 SCC (Cri) 308: 1988 Cri Lj 9x1.

that sub-section as abovementioned shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence. [S. 198(5)]

(c) Where the person aggrieved by an offence punishable under Section 494 or Section 495 IPC (bigamy) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the court, by any other person related to her by blood, marriage or adoption. [S. 198(1) proviso (c)]

Considering the existing social conditions and the economic dependence of women, it would appear difficult for a wife to lodge a complaint against her husband for bigamy. The above provision will prove useful in prosecuting persons alleged to have contracted bigamous marriages without much risk of intrusion of strangers in the private life of the family.[72]

In cases falling under proviso *(a)* or proviso (c) to Section 198(1) where a person can make a complaint on behalf of the aggrieved person only with the leave of the court, such leave cannot be presumed or implied from the mere fact that the court has taken cognizance on the basis of such a complaint. To hold that as the court took cognizance of the said offences it can be implied or presumed that the leave required under Section 198 was granted by it would be to render the provisions of Section 198 nugatory and ineffective, and the salutary object of the requirement of the leave under Section 198 would be frustrated and liable to be misused by interested persons.[73]

(9) *Prosecution of husband for rape*.—No court shall take cognizance of an offence under Section 376 of the IPC (rape), where such offence consists of sexual intercourse by a man with his own wife, the wife being under 15 years of age, if more than one year has elapsed from the date of the commission of the offence. [S. 198(6)]

The offence referred to in the section is non-cognizable. But the provision does not put any restriction as to the person who can file a complaint. The complainant may or may not be an aggrieved person. The provision only puts a time-limit on the taking of cognizance of any such offence. It would have been appropriate if this provision had been included in Chapter XXXVI IPC dealing with "Limitation for taking cognizance of certain offences".

The object of the provision is obvious. The belated prosecution of the husband does not appear to be in the interest of any person, and would prove detrimental to the subsequent normal family life, and as such would serve hardly any purpose.

72. *Mahendra Kumar Jain* v. *State o f U . P* ., 1988 Cri Lj 544 (Ail).

73. *Jogendra Maila* v, *Khira Dei,* 1980 Cri LJ 634, 635 (Ori). Also see, A. *Subasb Babu* v. *State of A.?.,* {2.011) 7 SCC *616:* (zoir) 3

{10) ***Prosecution of husband or his relative for cruelty to wife of the husband.***—The Criminal Law {Second Amendment) Act, 1983 (No. 46 of 1983) has put some restrictions on the taking of cognizance of offence under Section 498-A IPC by enacting Section 198-A as follows:

Prosecution of offences under Section 498-A of

198-A. No Court shall take cognizance of an offence punishable under Section 498-A of the Indian Penal Code (45 of i860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or with the leave of the Court, by any other person related to her by blood, marriage or adoption.

This indicates the legislature's concern for avoiding the possibility of innocent persons being harassed by unscrupulous persons.[74]

Cognizance of offence

The same concern is seen reflected in the new provision which has now been inserted as Section 198-B:

198-B. NO court shall take cognizance of an offence punishable under Section 376-B of the Indian Penal Code (45 of i860} where the persons are in a marital relationship, except upon *prima facie* satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.[75]

(11) ***Prosecution for defamation.***—Section 199(1) provides that no court shall take cognizance of an offence punishable under Chapter XXI IPC except upon a complaint made by some person aggrieved by the offence.

The offences contained in Chapter XXI IPC relate to

(i) defamation; [Ss. 499-500]

(ii) printing or engraving of defamatory matter; [S. 501] and

(Hi) sale of printed substance containing defamatory matter. [S. 50a]

Whether a person is aggrieved or not depends upon the nature of the offence and the circumstances of the case.[76] [77] It is a question of fact depend-

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aggrieved person where the wife has been defamed.[78 79 80] The father-in-law with whom the daughter-in-law is living might be the aggrieved person when the daughter-in-law has been defamed.[79 80]

The section recognises two exceptions to the abovementioned rule contained in Section 199(1). They are as follows:

{a} Where the aggrieved person is under the age of 18 years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who according to the local customs and manners ought not to be compelled to appear in public, some other person may, with the leave of the court, make a complaint on his or her behalf. [S. 199(1) proviso]

(1b) When any such offence as mentioned above in Section 199(1) is alleged to have been committed against a person who, at the time of such commission, is the President or Vice-President of India, the Governor of a State, the Administrator of a Union territory, or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without the accused being committed to it, upon a complaint in writing made by the Public Prosecutor. [S. 199(2.)]

In *John Thomas* v. *K. Jagadeesan*[SQ], the collocation of the words "by some persons aggrieved" in Section 199(1} CrPC was held to indicate that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the court depending upon the facts of each case. If a company is described as engaging itself in nefarious activities its impact would certainly fall on every director of the company and hence he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it.

Every such complaint referred to above shall set forth the facts which constitute the offence alleged, the nature of such offence, and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him. [S. 199(3)]

The complaint can be made only with the previous sanction

(/) of the State Government, in the case of a person who is or has been the Governor of that State or Minister of that Government, or in

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80. {2001} *6* SCC 30.

the case of any other public servant employed in connection with the affairs of the State;

(ii) of the Central Government in any other case. [S. 199(4)]

The Court of Session may take cognizance of any such offence as mentioned above only if the complaint is made within six months from the date on which the offence is alleged to have been committed. [S. 199(5)] This does not prescribe a period of limitation, but lays down a condition precedent to the institution of prosecution by Public Prosecutor.[81]

The above provision which permits a Court of Session to take cognizance of the offence of defamation committed in respect of certain dignitaries and public servants is not in substitution of the normal procedure for taking cognizance of such offence on the complaint of the aggrieved person. The right of the aggrieved person to make a complaint in respect of such offence before a Magistrate having jurisdiction remains unaffected, and so too remains unaffected the power of such Magistrate to take cognizance of the offence upon such complaint. [S. 199(6)]

The primary object behind this special provision contained in Section 199(2.), (5), (4), (5), above is to provide a machinery enabling the government to step in to maintain confidence in the purity of administration when high dignitaries and other public servants are wrongly defamed.[82] The section brings in the Public Prosecutor, who is expected to make the complaint with the government's approval and to conduct the trial before the Court of Session. It puts the whole weight of the government against the accused, in what would otherwise have been a private litigation between the accused and the public servant. This intervention of the State can be justified only on the ground that the Government has an interest in protecting its reputation when it is likely to be tarnished if an attack on its officers goes unchallenged, or, in other words, the defamation besides causing harm to the individual has caused appreciable injury to the State.[83] It may not be always expedient for the defamed dignitary or a public servant to make a complaint himself because of the duties of his office or because of the distance from the place of publication of the defamatory matter; in such situations it is convenient to have a complaint filed through the Public Prosecutor under this section.

Under Section 199(2.) it is not enough if a person aggrieved by commission of any offence included in Chapter XXIIPC is a public servant. He must also establish that he is a public servant employed in connection with the affairs of the State. Section 199(2} being a special provision intended

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82. 41st Report,

83. *Ibid,* para.

to protect the high dignitaries and other public servants employed in connection with the affairs of the Union or a State, the conditions laid down therein for invoking the protection must be strictly fulfilled. The satisfaction of the requirements contained in Section 199(2) should be with reference to the position which the public servant at the relevant time of the commission of the offence alleged by him occupied.[84]

It is well-settled that the burden of proving that a requisite and valid sanction has been accorded rests on the prosecution, and such burden involves proof that the sanctioning authority has given the sanction with reference to the facts on which the proposed prosecution is to be based, facts which may appear on the face of the sanction or may be proved by extraneous evidence.[85] However, it may be noted that in view of the special provision made in Section 465[86] (which was not there in the earlier Code of 1898) any error or irregularity in any sanction for the prosecution will not vitiate the outcome of the trial, unless such error or irregularity has in fact occasioned a failure of justice.[87] It may, however, be noted that under Section 465 the omission to obtain sanction for the prosecution is not a defect curable under that section.[88] Therefore, the decisions under the old Code should be relied on with care and caution and the new provision contained in Section 465 should not be lost sight of while considering such decisions.

TABLE 8: Cognizance of Offences

By whom	(<t) Magistrate of First Class [S. 190] (f>) Magistrate of Second Class, if specially empowered, in respect of offences triable by him [$. 190] W Court of Session only in respect of J _r_ __ ȴ- .ft r_1. Jr_.-rj--.r-_ - j_ _ rr>
When	(IT) upon receiving a complaint [S. 190] (.b) upon a police report [S. 190] (c) upon information received from other source or on Magistrate's own knowledge

Limitations

Mo cognizance in respect of	except
(i) offencer invotving rnntempt °f l[awf]ul on the written complaint of the concerned [a]uth°rity [of] puHfc servant [Ss. '7?88 public servant [S. 195]	

84. S. *Dasaratharami Reddi* v. *A.H. Dara,* 1980 Cri Lj 377 (AP).
85. *Pachballoor Noobu* v. *Public Prosecutor,* 1975 Cri Lj 1304 (Ker); see also, *Gokulcband EDwarkadas Morarka* v. R., {1948} 49 Cri LJ 261, 2.63: {1947-48) 75 IA 30: {1948} *61* LW 257: AIR 1948 PC 82; *State of Rajasthan* v. *Tarachand fain,* {1974) 3 SCC 72: 1973 SCC (Cri) 774: 1973 Cri Lj 1396.
86. For the text of S. 465, *see supra,* para. 7.9.
87. *State of Orissa* v. *Mrutunjaya Panda,* (1998) 2 SCC 414: 1998 SCC (Cri) 644.
88. *Alfredo Gonsalves* v. *State,* 1980 Cri LJ 511, 513 (jCC Goa).

{contd.)

(2) offences against public justice [Ss. 193-96,199, 200,205 -211	on the written complaint of the concerned court [S. 195]
(3) offences relating to documents produced in court [Ss. 463·47c·475·47[6 IPC]	on the written complaint of the court concerned [S. 195]
(4) offences against State etc. [Ss. 121 -30,153-A, 153-8,295-A, 505 IPCj	with the previous sanction of the appropriate government or, in certain cases, of the District Magistrate [S, 196] with the written consent of the State Government or the District Magistrate [S.196]
(5) offences of criminal conspiracy to commit an offence punishable with less than two years' imprisonment [S. 120-BIPC]	with the previous sanction of the appropriate
(6] offences committed by judge or public servants acting in the discharge of their official duties	
(7) offences committed by the members of the armed forces acting in the discharge of official duties	on a complaint of the person aggrieved [S. 198] when the complaint is filed
(8) offences against marriage [Ss. 493-98 IPC]	within one year [S. 198(6)]
(9) rape by husband against his minor	

Chapter 11

Commencement of Proceedings Before Magistrates

Scope of the chapter **11.1**

The preceding Chapter 10 dealt with the circumstances in which Magistrates could take cognizance of the offences. Cognizance of an offence by a Magistrate implies that the Magistrate has applied his mind to the offence alleged in the complaint or police report with a view to take further proceedings necessary for the trial of the accused person. The present chapter deals with the proceedings which follow the taking of the "cognizance" by the Magistrate and which are preparatory to the trial of the case. Sections 200 to 203 would be found useful for weeding out false, frivolous and vexatious complaints aimed at harassing the accused person.

> Everyday experience of the courts shows that many complaints are ill founded, and it is necessary therefore that they should at the very start be carefully considered and those which are not on their face convincing should be subjected to further scrutiny so that only in substantial cases should the court summon the accused person.[1]

It must be remembered that an order summoning a person to appear in a court of law to answer a criminal charge entails serious consequences. It has the effect of abridging the liberty of a citizen which is held so precious and sacred in our Republic. Such an order must not be passed unless it has behind it the sanction of law. With this end in view Sections 200 to 203 have been enacted. Their scope is to distinguish unfounded from genuine

1. *See,* 41st Report, p. 132, para. *x6.z.*

cases so as to root them out at the very outset without calling upon the party complained against.[2]

The weeding-out operation envisaged by Sections *zoo* to 203 is exclusively applicable in cases where the cognizance is taken on a complaint. For obvious reasons such special procedure is not needed in cases where cognizance has been taken on a police report. Section 204 mentions the conditions in winch the Magistrate may issue a summons or a warrant for the purpose of securing the attendance of the accused at the time of trial. Section 205 empowers the Magistrate to dispense with the personal attendance of the accused in deserving cases. Section 206 requires a Magistrate to issue a special summons in cases of petty offences so as to enable the accused, if he so desires, to send the pleading of guilty to the Magistrate and to remit the amount of fine mentioned in the summons without the necessity of personally appearing before the Magistrate. Sections 207 to 208 provide for the supply to the accused person of copies of documents like the police report, statements recorded by the police during investigation etc., so that the accused is enabled to know adequately and in time the alleged charges against him and the evidence the prosecution intends to give against him at his trial. Section 209 prescribes the procedure to be followed by the Magistrate when the offence is exclusively triable by a Court of Session. Section 210 provides for the procedure to be followed when there is a complaint case and a police investigation in respect of the same offence. The following paragraphs deal with these matters.

11.2 Scrutiny of the complaint before issue of process

(a) *Examination of complainant*.—Section 200 provides that a Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and that the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

According to the definition given in Section 2(d)[3] a complaint can be oral or in writing and there is nothing in that definition which may even impliedly mean that the complaint must be made to the Magistrate person- ally.[4] Nor does Section 200 or any other section require the complainant to present a written complaint personally to the Magistrate.[5] Therefore, a complaint sent by post is valid and cognizance can be taken on such a complaint also.

However, whether the complaint is in writing or otherwise, the section [S. 200] makes it obligatory to examine the complainant on *oath.*[6]

2. *Gopi Nath & Sons* v. *State ofH.P1981* Cri Lj 175, 179 (HP).
3. For rhe definition of "complaint" ***see supra,*** para. 20.i.
4. ***State*** v. ***S.D. Gupta,*** 1973 Cri Lj 999, 1002 (AH).
5. *ibid.*
6. ***P.N.S. Ayer*** v. ***K.j. Nathan,*** (1948) 49 Cri LJ 554: AIR 1948 Mad 424; ***Abhoy***

The object of such examination is to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such a person.[7] The provisions of Section zoo are not a mere formality, but have been intended by the legislature to be given effect to for the protection of the accused persons against unwarranted complaints.[8] The provisions are undoubtedly mandatory and not discretionary.[9] The section requires the Magistrate to examine the complainant and the witnesses present. This duty being imperative, the Magistrate should ask the complainant whether any witnesses are present. If there are no such witnesses present, the Magistrate should also record this fact in the order-sheet.[10] It has also been stated that a list of witnesses is insisted upon to help the accused.[11] However, the nonmention of the presence or otherwise of the witnesses of the complainant would not by itself vitiate the proceedings under Section zoo.[12]

The examination of the complainant on oath is not a mere formality and the dismissal of a complaint without such examination is illegal.[13] A statement on oath falls in a distinct category and cannot be equated with a statement which may be made without taking oath. The legislative object in requiring the statement on oath cannot be allowed to be superseded by the provisions of Section 465.[14] However, it is not necessary that the Magistrate taking cognizance must invariably examine the witnesses named in the petition of complaint.[15] Nor is it necessary for the Magistrate to record reasons for summoning.[16] If after examining the complainant on oath and after finding prima facie case against the

Bangshadhar Mitra. (1949} 49 Cri LJ 647: AIR 1949 Cal 58.

7. *Nirmaljit Singh Ho on* v. *State of W.B.,* (1973) 3 SCC 753: 1973 SCC {Cri) 521, 529; *Brahmanand Goyal* v. *N.C. Chakraborty,* 1974 Cri LJ 1079, 1081 (Cal); see also, *Nina Nargis Devaud* v. *Farida G. Devecha,* 1991 Cri LJ 2694 (Kant).
8. *MacCulloch* v. *State,* 1974 Cri LJ 182 (Cal); *Brahmanand Goyal* v. *N.C. Chakraborty,* 1974 Cri Lj 1079 (Cal}:/.N. *Mitra* v. *State,* 1974 Cri Lj 1441, 1445 (Cal); *Nemichand* v. *State of Karnataka,* 1980 Cri Lj 751, 753 (Kant).
9. *MacCulloch* v. *State,* 1974 Cri LJ 182 (Cal); *PS. Ramaswami Nadar* v. R. *Viswanathan,* 1957 Cri Lj 673 (Mad).
10. *Brahmanand Goyal* v. *N.C. Chakraborty,* 1974 Cri LJ 1079, 1081 (Cal); *PS. Ramasujami Nadar* v. *R. Viswanathan,* 1957 Cri Lj 673 (Mad).
11. *F.A. Poncha* v. M. *Meherjee,* 1995 Cri Lj 352 (Mad).
12. *Nemichand* v. *State of Karnataka,* 1980 Cri LJ 751, 754-55 (Kant); also see. *Bairo Prasad* v, *Laxmihhai,* 1991 Cri LJ 2535 (MP): *Dinahandhu Das* v. *Batakrushna Das,* 1991 Cri Lj
13. *Ramaswami Iyengar, re,* (1922) 23 Cri LJ 691: AIR 1922 Mad 443; *P.N.S. Ayer* v. *K.f. Nathan,* (1948) 49 Cri LJ 554: AIR 1948 Mad 424; *Ningappa Rayappa, re,* ILR 48 Bom 360; (1924) 25 Cri Lj 960; *see also,* observations in *Charan Rout* v. *Prafulla Kumar Mangaraj,* 3997 Cri Lj IOTO (Ori).
14. B.S. *Vohra* v. *Risal Singh,* 1974 Cri LJ 177 (Del). For the text of S. 465, *see supra,* para. -7.9.
15. *Ramesh Kumar* v. *Raghubans Mani,* 1977 Cri LJ 463 (Pat); see also, *Kochu Mohammed* v. *State of Kerala,* 1977 Cri Lj 1867 (Ker); see also, *Charan Rout* v. *Prafulla Kumar Mangaraj,* 1997 Cri Lj 1010 (Ori).
16. *Hatia Swain* v. *Chinta?nam Mishra,* 1990 Cri Lj 47 (Ori).

accused, process is issued to the accused, then simply because the witnesses "if any" were not examined by the Magistrate would not vitiate the proceedings under Section 200. It has been held that an accused cannot get a Magistrate's order issuing process set aside, on the ground that the Magistrate's examination of the complainant and his witnesses was improper.[17] In some cases, the non-examination or improper examination has been held to be an irregularity not vitiating the proceedings in the absence of failure of justice or prejudice to the accused.[18] It has also been held that the non-examination may prejudice the complainant and not the accused person.[19]

Section 200 further provides, by way of exception to the abovemen- tioned rule regarding the examination of the complainant and the witnesses, that when the complaint is in writing, the Magistrate need not examine the complainant and witnesses

(2) if a public servant, acting or purporting to act in the discharge of his official duties, or a court has made the complaint, [proviso *(a)* to S. 200] The object of this exception is to obviate the inconvenience which might be caused to a judge or public servant making a written complaint under Section 195[20] read with Section 340.[21] It pertains both to the statutory duty to make the complaint and equally to the nature of the incident and the offence against the public servant.[22] *iji)* if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section ipa.[23] Further, it has been provided that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them, [proviso *(b)* to S. 200] The result is, in case of a written complaint, only one examination of the complainant and of the witnesses will be considered adequate compliance with the rule.

Where a report submitted by a Station House Officer cannot be treated as a police report under Section 173 of the Code, under certain circumstances, it could be treated as a complaint as defined in Section 2(d) and coming within the scope of Section 190(i)(#). In such a case the Station House Officer submits the complaint or the report not in his private capacity but

17. *Duruasa* v. *Chandrakala,* 1994 Cri Lj 3765 (Kant).
18. *Begum Rai* v. *State,* (1952.) 53 Cri Lj 473: AIR 1952 Pat 154; *Apt Samal* v. *Bisi Mallik,* 1953 Cri LJ 655: AIR 1953 Ori 83; *Bharat Kishore Lai* v. *Judbistir Modak,* (1929} 30 Cri LJ 1056: AIR 1929 Pat 473 (FB); S.M. *Jaffry* v. *State,* 1955 Cri LJ 767: AIR T955
19. *Subramania Achari, re,* 1955 Cri LJ 314: AIR 1955 Mad 129.
20. For the contents of S. 195, *see supra,* para. 10.5(2) and {3).
21. For the text of S. 340, *see supra,* para. 10.5(2).
22. *Ramdhani Sao* v. *State of Bihar,* 1987 Cri Lj 1428 (Pat).
23. For the contents of S. 192, *see supra,* para. 10.3(h) and (c).

in his capacity as a police officer. His examination is not necessary under Section 200 and cognizance can be taken without such examination by virtue of the proviso *(a)* to Section 200 as mentioned above.[24]

It has been ruled that Magistrate can take cognizance of an offence without passing a speaking order. The Magistrate's reliance on the statement of the complaint to the police given in connection with an earlier complaint was held proper.[25]

Even in respect of a complaint made by a public servant acting or purporting to act in the discharge of his official duties or in respect of a complaint made by a court, though it is not obligatory for the Magistrate to examine the complainant and the witnesses present if any, there is no bar for the Magistrate to make such examination of the complainant and the witnesses if it considers it necessary to do so. In fact in appropriate cases he must do so.[26]

If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall

{/) if the complaint is in writing, return it for presentation to the proper court with an endorsement to that effect.

(U) if the complaint is not in writing, direct the complainant to the proper court.[27] [S. 201]

[b) Inquiry or investigation for further scrutiny of the complaint.—Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which had been made over to him under Section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. However, no such direction for investigation shall be made

i) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or *U)* where the complaint has been made by a person other than a court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200 *{supra).* [S. 202(1)] The words "and shall", in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction came to be added to Section 202 enabling the Magistrate to postpone the issue of process if the accused resides beyond his jurisdiction.[28] It has been further provided that if such an investigation is to be made by a person other than a police officer, that person shall have for the purposes of the

24. *Maniyeri Madhavan* v. *State of Kerala,* 1981 Cri LJ 569, 570 (Ker).
25. *Jagdish Ram* v. *State of Rajasthan*[A] 1989 Cri Lj 745 (Raj).
26. *Gopi Nath & Sons* v. *State of H.P.,* 1981 Cri Lj 175, 180 (HP).
27. *Rakesh* v. *State of Rajasthan.* 1987 Cri LJ 1342 (Raj),
28. *bis.* by the Code of Criminal Procedure (Amendment) Act, 2005 (w.e.f.

investigation ai! the powers conferred by the Code on an officer in charge of a police station except the power to arrest without warrant. [S. 202.(3)]

In view of sub-section (3), the reference to a Magistrate in Section 202 has to be construed as reference to a judicial Magistrate. There does not appear to be any bar in directing an investigation to be made by an Executive Magistrate under Section 202(1). According to that section the collection of evidence can be made by a police officer or by any other person who is thought fit and is authorised by a Judicial Magistrate in that behalf.[29]

The object of Section 202 is to enable the Magistrate to form an opinion as to whether the process should be issued or not, and to remove from his mind hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. What the Magistrate has to see is whether there is an evidence in support of the allegations made in the complaint, and not whether the evidence is sufficient to warrant a conviction.[30] It may be noted that the words "if he thinks fit" give full discretion to direct investigation or to decide to make an inquiry. The discretion, however, would be exercised judicially. Where the complainant is not able to trace the persons alleged to have committed a non-cognizable offence, the Magistrate is bound to cause an investigation by the police.[31]

The main object of the investigation directed under this section is to help the Magistrate in making a decision as to the issue of process. The investigation or inquiry need not be thorough and exhaustive.[32 33] As mentioned earlier, no investigation is to be directed if the offence is exclusively triable by the Court of Session. Probably this restriction might indirectly achieve the objective of having an inquiry made by the Magistrate himself. Further, in a case where the complaint has not been made by a court, no investigation is to be directed unless the complainant and his witnesses have been examined on oath. Directing an investigation before such examination will vitiate the proceedings and shall not be curable by Section 465.^

29. *Ramprabesb Rat* v. *Bisbnu Mandal,* 1981 Cri Lj 139 (Par).
30. *Chandra Deo Singh* v. *Prokash Chandra Bose,* {1963} 2 Cri IJ 397: AIR 1963 SC 1430; *Vadilal Vanchalw Dattatraya Dulaji Ghadigaonkar,* 1960 Cri 1.J 1499: AIR 1960 SC 113; *Balraj Khanna* v. *Moti Ram,* {1971) 3 SCC 399: 1971 SCC {Cri) 647; *Hagaunua* v. V.S. *Konjalgi,* (1976} 3 SCC 736: 1976 SCC (Cri) 507, 511: 1976 Cri LJ 1533.
31. *Sevantilal Shah* v. *State of Gujarat,* 1969 Cri Lj 63: AIR 1969 Guj 14.
32. *Markandey Rai* v. *Sheo Kumar Thakur,* {1961} * Cri Lj 417: AIR 1961 Par 12,0; *Permanand Brahmachari* v. *Emperor,* (192.9) 30 Cri Lj 554: AIR 1930 Pat 30; *Emperor* v. *Einan,* {1932) 33 Cri Lj 72: AIR 1931 Bom 524.
33. *Subramanla Achari, re,* 1955 Cri Lj 514: ArR 1955 Mad 129; *B hag wan Das* v. *Emperor,* AIR 1935 All 745; *Ningappa Rayappa, re,* ILR 48 Bom 360: (1924} 25 Cri Lj 960; *Jit Singh* v. *Ayub Khan,* (1942) 43 Cri Lj 803: AIR 1942 Pesh 61; *see* however contra, *Api Samal* v. *Bisi Mallik,* 1953 Cri Lj 655: AIR 1953 Ori 83. For the text of S.

If the Magistrate decides to inquire into the case himself, he has the discretion to take, or not to take, evidence of witnesses on oath. However, if the offence complained of appears to be one exclusively triable by the Court of Session, the Magistrate is required to call upon the complainant to produce all his witnesses and to examine them on oath. [S. 2.02(2)] The idea appears to be that in cases of offences exclusively triable by the Court of Session, the inquiry should be rather broad-based, while in other cases the nature of the inquiry is left to the discretion of the Magistrate. The broad-based inquiry by the Magistrate, as mentioned above, becomes necessary only in those cases where the Magistrate after examining the complainant and his witnesses (present) is not able to make up his mind as to whether he should dismiss the complaint or whether he should proceed to issue process upon the complaint.[34] Where the case is one triable exclusively by a Court of Session under the proviso to Section 202(2), it is dearly and unambiguously mandatory on the part of the Magistrate to call upon the complainant to produce *all* his witnesses and examine them on oath.[35] The word used is "all" and "all" does not mean "some". The examination of witnesses is not a mere formality. The provision has been enacted so that the accused has full information about the allegations about him and to enable him to prepare for his defence. In a private complaint unless the witnesses are examined as contemplated by Section 202(2) the accused will not be in a position to point out any contradictions when they give evidence in the Court of Session.[36]

The complainant need not remain present in court during such inquiry. There is no provision in the Code to compel the complainant to be present when the inquiry under Section 202 is conducted, especially when the complainant has been already examined on oath. Dismissal of the complaint in such a situation would be illegal.[37]

It is unnecessary and even unfair procedure to issue notice to the accused person to attend the inquiry. Such a procedure is entirely unwarranted by the Code. The whole scheme is that the accused person does not come in the picture unless and until process is issued.[38] If the accused

34. *B, Lakshmanna* v. B. *Narasappa,* 1974 Cri Lj 12.7 (AP); see also, *State* v. *Kastu Babers,* 1975 Cri Lj 117S, 1179 (Ori).

35. *Maideenkutty Hajiv. Kunhikoya,* 1987 KLj 492: (1987) 1 KLT 635; see also, *Perni Ailamma* v. *Telia Zedson,* 1989 Cri LJ 7S3 (AP); *Harisb Dwarkadas Gandhi v.* G.B. *Yadau,* 1989 Cri LJ 2179 (Bom). *But see* contra, *Abdul Hamtdkban Pathan* v. *State of Gujarat,* 19S9 Cri LJ 468 (Guj).

36. *Ramchander Rao* v. *Boina Ramchander.* 1980 Cri Lj 593, 595 (AP); see also, *Kamal Krishna* v. *State,* 1977 Cri LJ 1492 {Cal); *Raranjolhi Udyar* v. *State,* 1976 Cri Lj 598 (Mad); *Babu Ram* v. *State ofU.P..* 1978 Cri Lj 1430 (Ail).

37. *Lily Thomas* v, *izuddm,* 1974 Cri LJ 734 (Mad).

38. *Cha?tdra Deo Singh* v. *Prokash Chandra Bose,* (1963) 2 Cri Lj 397: AIR 1963 SC 1430; *Appa Rao Mudaliar* v. *janaki Amtnal,* (1927) 28 Cri Lj 129: ILR (1927) 49 Mad 918 (FB); *Yaradarajulu Nayudu* v. *Kuppuswamy Nayudu,* (1927) 28 Cri LJ 113: ILR (1926) 49 Mad 926; *Anil Kumar* v. *Pranada Chakrabarty,* 1958 Cri Lj 373: AIR 1958 Cal 146; *Ram Narain* v. *Bishamber Nath,* {1961) 1 Cri Lj 553: AIR 1961 Punj 171; *Nagawu-a* v.

chooses to remain present either personally or through an advocate at the time of such inquiry, he cannot take part or he cannot be allowed to take part in the inquiry.[39] Further, it would not be open to the Magistrate to put any question to the witnesses at the instance of the accused person nor can he examine any witnesses at the instance of the person named as accused.[40] Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice but beyond that he cannot go.[41] For being satisfied with regard to the *prima facie* truth of the complaint and for a decision as to whether there is sufficient ground for proceeding with the case, it is certainly open to the Magistrate to put appropriate questions to the witnesses produced by the complainant. If the Magistrate is simply to hear and record whatever the complainant and his witnesses say without any power to elicit information by putting questions to them, it would be practically impossible for the Magistrate to ascertain the truth or otherwise of the complaint.[42]

It would be clear from the above discussions that where a Magistrate, on receiving a complaint, chooses to take cognizance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused, but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(0b/ The Magistrate can postpone the issue of process and direct an inquiry himself.

(c) The Magistrate can postpone the issue of process and direct an investigation by the police or by any other person.[43]

Konjalgi, {1976} 3 SCC 736: 1976 SCC (Cri) 507: 1976 Cri LJ 1533; *M. Srinivasidu Reddy* v. *State,* 1993 Cri LJ 558 (All); *Union of India* v. *W.N. Chadha,* 1993 Supp (4} SCC 260: 1993 SCC (Cri) 1171: 1993 Cri LJ 859; *Sk. Siraj* v. *State of Orissa,* 1994 Cri LJ 2,410 (Ori); *Vishnu Dutt* v. *Govmd Das,* 1995 Cri LJ 263 (Raj); *R.P. Sharma* v. *Man Mohan Mathur,* 1995 Cri LJ 387; *Radhacharan v. Omprakasb Misbra,* 1993 Cri LJ 67 (MP); *Markandey Singh Kushawaha* v. *State of U.P.,* 1995 Cri LJ 1635 (All); also see, M. *Thulasidass* v. *K. Goumdaraju,* 1995 Cri LJ 1660 (MP); *Laxmi K is ho re Tonsekar* v. *State of Maharashtra,* 1993 Cri LJ 2772 (Bom); *Ramdoss* v. *State ofT.N1993* Cri LJ 2147 (Mad).

39. *Laxntikant v. Cokuldas,* 1976 Cri Lj 381 (Bom); *Thilakan* v. *Sttkumaran,* 1981 Cri LJ 1162, 1164 (Ker); *Budhi Parkash* v. *K.C, Sharma,* 1981 Cri LJ 995 (P&H); *Naganagouda Veeranagouda Patil* v. *Malatesh H. Kulkarni,* 1998 Cri LJ 1707 (Kant),
40. *Chandra Deo Singh* v. *Prokash Chandra Bose,* (19S3} 2 Cri LJ 397: AIR 1963 SC 1430,
41. *Ibid.*
42. *Mohd. Raiazuddin, re,* 1976 Cri LJ 125 (AP).
43. *Tula Ram* v. *Kishore Singh,* (1977) 4 SCC 459, 463: 1977 SCC (Cri) 621: 1978 Cri LJ 8; see also, *P.R. Muriigaiyan* v. *j.P. Nadar,* 1977 Cri LJ 1700 (Mad); see also, *Tung Nath Ojha v. Haji Nasiruddin Khan,* 1989 Cri Lj 1846 (Pat) wherein the Magistrate got an inquiry conducted by a senior police officer before taking cognizance.

However, if the Magistrate makes an inquiry himself he cannot direct investigation; and when he directs an investigation, he cannot inquire into the matter himself.[44] In a case where the respondent, after having been convicted in the police case initiated, a complaint case against the petitioners on the same incident and the Magistrate issued process. The Magistrate's action was assailed in the Delhi High Court which following the Supreme Court's decision in *Gopal Vijay Verma* v. *Bhuneshwar Prasad Sinha*[45], ruled that the Magistrate's act was valid. The court has not examined Section 300 of the Code. Nor was the question whether the High Court was entitled to do in the exercise of inherent powers discussed.[46] In yet another case the Allahabad High Court okayed the order of a Magistrate issuing summons to a person after having rejected the petitioner's first request for summoning the accused and that order having been approved by the High Court.[47]

The Andhra Pradesh High Court has given a decision which appears to run counter to the above decision. It was a case where the respondent after having his case on police report been closed, hied complaint against the petitioner on the same pleas. The Magistrate took cognizance on the complaint and issued process. On having challenged by the petitioner, the Andhra Pradesh High Court ruled that neither the acceptance nor the non-acceptance can be termed as "administrative action of the Magistrate". His closing of the case is a judicial act. After the exercise of this judicial power, he has no power to issue process in view of Section 36Z of the Code.[48]

It may also be noted that when the Magistrate postpones the issue of process he cannot direct a further inquiry by another Magistrate. He can make a further inquiry into the case himself or send it for investigation to a police officer or to any other person.[49] Within the limits circumscribed by Section zoz, the Magistrate taking cognizance is empowered to direct an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus the object of an investigation under Section zoz is not to initiate a fresh case on a police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.[50] The expression "the person holding investigation shall have all the powers of an officer in charge of a police station" has to be construed within the framework and in the light of the provisions of Section zoz which refers to a stage after the cognizance has been taken in

44. *Sankar Chandra v. Rooprajj* 1981 Cri Lj 1002, 1005 (Cal).
45. (1982) 3 SCC 510: 19S3 SCC (Cri) ITO.
46. *M.P. Srivastaua* v. *Sqn. Ldr. K.V. Vashist,* 1991 Cri LJ 12 (Dei).
47. *Kumari Misra* v. *Chander Roshni,* 1994 Cri LJ 2157 (AU).
48. P.V. *Krishna Prasad* v. *K.V.N. Koteswam Rao,* 1991 Cri LJ 541 (AP>.
49. *Asoke Chatterfee* v. *Manisha,* 1976 Cri LJ S76. S78 (Cal).
50. *D. Lakshminarsyana* v. V. *darayana Reddy,* (1976) 3 SCC 252, 258: 1976 SCC (Cri) 380: 1976 Cri LJ 1361.

the case. Investigation, thereafter, is designed for the purpose of issuing process against the accused and to that purpose alone the investigating officer has to direct his attention.[39]

In an investigation or inquiry under Section 2.02 the accused has no say in the matter at that stage. The Patna High Court opined that "while under the old Code investigation under Section 202 was with a view to ascertaining truth or falsehood of the complaint the scope of inquiry under Section 202 of the new Code is much wider and its purpose is for deciding whether or not there is sufficient ground for proceeding"/[2] If the Magistrate holds an inquiry into the case himself, he has got power to take evidence of witnesses on oath, irrespective of the fact whether those witnesses are persons present in court or produced in court by complainant or summoned by the Magistrate.[53] Section 202(1) does not require a Magistrate to hold an inquiry whenever it appears to him that the offence complained of is triable exclusively by a Court of Session and that way Section 202(2) does not control and govern Section 202(1). In a case where a complaint is filed not by the public servant and where the offence is exclusively triable by the Court of Session, the Magistrate should follow the proviso to Section 202(2) and call upon the complainant to produce all his witnesses and examine them.[54] However, in a case where a complaint is filed by a public servant after holding an inquiry and recording the statements, question of recording of such evidence may not arise.[35] In conducting the examination the Magistrate has no power to prescribe or limit the number of witnesses for the purposes for which they have got to be examined. It is for the complainant to choose and append a list of witnesses to the complaint. Therefore, the right of the complainant with regard to the witnesses mentioned in the list cannot be interfered with by the court nor his right to give up some of them can be interfered with by the court. It is open to the complainant to give up some of the witnesses and those witnesses that were so given up can no more answer the description of "his witnesses" within the meaning of that expression as occurring in the proviso to Section 202(2)^ Therefore, non-examination of the witnesses given up by the complainant cannot vitiate the proceedings.[51 52 53 54 55 56 57]

51. *Jamaluddin* v. *State of Bibar,* 1980 Cri LJ 1054, 1056 (Pat).
52. *Anil Kumar Sab* v. *Nagendra Singh,* 1991 Cri LJ 421 (Pat). *See also,* discussions in *Mohd. Basheer* v. *State of Kerala,* 2.009 Cri Lj 246 (Ker),
53. *Thilakan* v. *Sukumaran,* 1981 Cri Lj 1162. 1164 (Ker).
54. *Moideenkutty Haji* v. *Kunhikoya,* 1987 KLj 492: (1987) *1* KLT 655; *Dinabandhu Das* v. *Batakrushna Das,* 1991 Cri LJ 3273 (Ori); *Dharmvir* v. *State of U.P.,* 1990 Cri LJ 2525 (All); also see, *Bata* v. *A.nama Bebera,* 1990 Cri LJ m0 (Ori); *Perni Ailarnma* v. *Telia Zedson,* 1989 Cri LJ 7S3 (AP); *Harish Dwarkadas Gandhi* v, *G.B. Yadav,* 19S9 Cri LJ 2179 (Bom); *Abdul Hamidkban Pathan* v. *State of Gujarat,* 1989 Cri LJ 468 (Guj); *Shivjee Singh* v. *Nagendra Tiwary,* (2010} 7 SCC 578: (2010) 3 SCC (Cri) 452: 2010 Cri
55. Rosy v. *State of Kerala,* (2000) 2 SCC 230: 2000 SCC (Cri) 379.
56. *Jumman* v. *State of U.P.,* 1988 Cri LJ 199 (All).
57. *M.N. Reddy* v. *Kanakanti Mai Reddy,* 1977 Cri Lj 1473, 1475 (AP); see aiso, *K.*

Further, while *only the substance* of the examination of the complainant and the witnesses (if any) is required to be recorded by Section 200, there is nothing which would justify a Magistrate holding an inquiry under the proviso to Section 202(2) to record the substance only of the evidence adduced before him. If he does so he acts arbitrarily and illegally. Such an arbitrary act of the Magistrate may seriously prejudice an accused and put the Sessions Court into an embarrassing position.[58] At the inquiry stage, it is the duty of the trial court to elicit all facts not merely with a view to protect the interests of an absentee accused person, but also with a view to bring to book a person or persons against whom grave allegations are made.[59]

The proviso to Section 202(2) is intended to enable the accused to have an overall picture of the case against him and to afford him a full and fair opportunity of defending himself. This has been held to be mandatory. Some High Courts held that non-compliance with the proviso to Section 202(2) cannot be treated as "irregularity" that could be cured under Section 465. It was also opined that non-compliance was likely not only to mislead the accused but also to end in failure of justice.[60]

A two-member Bench of the Supreme Court had an occasion to analyse the question in *Rosy* v. *State of Kerala*[61] *(Rosy).* While M.B. Shah j held it to be discretionary, K.T. Thomas j described it to be mandatory. According to Shah J, non-compliance with the provision would not vitiate further trial unless it is established that prejudice was caused to the accused.

Justice Thomas held that omission to follow the provision is not by itself vitiative of the proceedings. However, if objection is raised at a belated stage, it has to be decided under Section 465 whether the omission has resulted in miscarriage of justice.

In *Rosy*[62], however, since the objection was raised belatedly *i.e.* after the accused's statements under Section 313 were recorded, both the judges agreed that the High Court's order directing the Magistrate to conduct the inquiry afresh and to recommit, was bad. They directed the Sessions judge to complete the hearing and dispose of the case.

Dismissal of complaint

If, after considering the statements on oath (if any), of the complainant and of the witnesses, and the result of the inquiry or investigation {if any)

11.3

Amma v. K. *Ravindran Nair,* 1979 Cri Lj 12.79. 12S0 (Ker) (FB).

58. *Gobinda* v. *Subala,* 1979 Cri Lj 1005, 1006 (Cal).
59. *Budhi Park ash* v. *K.C. Sbarma*, 1981 Cri IJ 993 (P&'H).
60. *Kamal Krishna* v. *State,* 1977 Cri Lj 1492. 1497 (Cai); *Bajji* v. *State ofM.P1981* Cri Lj 155S, 1562 (MP).
61. (2000) 2 SCC 230: 2000 SCC (Cri) 379.
62. *Ibid.*

under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for doing so. [s. 203]

Section 203 requires a Magistrate taking cognizance of an offence on a complaint to form a judgment as to whether or not there are sufficient grounds to proceed with the case. This judgment must be based on the statements made by the complainant and his witnesses and the result of the investigation or inquiry under Section 202, if any. The Magistrate must apply his mind to these materials and then form his judgment as to whether or not there is "sufficient ground for proceeding".[63][64][65]

In *Chandra Deo Singh* v. *Prokash Chandra* Bose[63][64], where dismissal of a complaint by the Magistrate at the stage of inquiry under Section 202 was set aside, the Supreme Court laid down that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction. The court further observed that where there is prima facie evidence, even though the accused may have a defence that the offence is committed by some other persons, the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused.[65] Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case.[66]

At the stage of Sections 203 and 204 in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202 there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding" against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. Even at the stage of framing charges the truth, veracity and effect of the evidence which the complainant produces or proposes to adduce at the trial, is not to be meticulously judged. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Section 202 or 204, if there is prima fade evidence in support of the allegations in the complaint

63. *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar,* {1962} 1 Cri Lj 770: AIR 1962 SC 876; *Vadilal Pancbal* v. *Dattatraya Dulaji Ghadigaonkar,* 1960 Cri Lj 1499: AIR 1960SC m3;

64. (1963) 2 Cri LJ 397, 40 0: AIR 19 *(S3* SC 1430.

65. *Ibid,* 402 (Cri Lj).

66. *Nirmaljit Singh Moon* v. *State ofW.0.,* (1973) 3 SCC 753: 1973 SCC (Cri) 521, 530. *See also,* cases mentioned in *supra,* note 47.

relating to a case exclusively triable by the Court of Session, that will be sufficient ground for issuing process to the accused and committing him for trial to the Court of Session.[67 68]

In exercising his discretion under Section 203 the Magistrate should not allow himself to be influenced by consideration of the motive by which the complainant may have been actuated in moving in the matter; nor by any other consideration outside the facts which are adduced by the complainant in support of his complaint.[68]

Mere lapse of time between the commission of the offence and date of complaint is no ground for throwing out the complaint, though that may be a relevant consideration at the trial for assessing evidence when that is adduced.[67 68 69]

Section 203 requires that in every case the Magistrate dismisses the complaint under this section, he *shall* briefly record his reasons for doing so. Without reasons, it would be almost impossible to determine whether the Magistrate while dismissing the complaint applied his mind to the facts, or whether the discretion was properly exercised or not. The order of dismissal of complaint is subject to scrutiny by higher courts and is revisable; and therefore the recording of reasons for such dismissal would be useful for such scrutiny. It should be possible for the accused at this stage to satisfy the Magistrate that there was no case at all against him and that he can even recall the order issuing process under Section 204 and dismiss the complaint under Section 203.[70] The imperative duty of considering the relevant materials and the requirement of the recording of the reasons are necessary safeguards against the arbitrary dismissal of a complaint.[71] Where a complaint is preferred against several persons and the order passed amounts to the dismissal thereof against some of them, it must contain brief reasons for not proceeding against such of the accused persons against 'whom no order as to issue of process is passed under Section 204(1) of the Code. Where a complaint is brought alleging that several offences have been committed by the accused persons and the Magistrate finds sufficient grounds for proceeding against all of them or some of them in respect of some of the offences, his order will amount to a dismissal of the complaint against such persons in respect of other offences. In that case also the provisions of Section 203 will come into play and the Magistrate will have to state brief reasons as to why he considers

67. *Kewal Krishan* v. *Suraj Bhan,* 1980 Supp SCC 499: 1981 SCC (Cri) 43 S, 442: 1.980 Cri Lj 1271; see also. *State of Bihar* v. *Ramesh Singh.* (1977) 4 SCC 39: 1977 SCC {Cri} 533: 1977 Cri Lj *1606.*

68. K.S. Chockalinga?yi v. T. *Kannappan,* 1977 Cri Lj 1382, 1386 (Mad).

69. *Balarani Kali v.Jagannatb Kali,* 1967 Cri Lj 462 (Cal); *K. S. Chockalingam* v. *T. Kannappan.* 1977 Cri LJ 1382, 1387 (Mad).

70. *Kailash Chaudhari* v. *State of U.P.,* 1994 Cri Lj 67 {Ail}; *Manmohan Malhotra* v. P.AL *Abdul Sala?n,* 1994 Cri LJ 1555 {Ker}.

71. *See,* 41st Report, p. 135, para. 16.13.

that there is no sufficient ground for proceeding against the accused persons for the offences for which no action is initiated against them.[72]

The order of dismissal of a complaint without recording reasons would he illegal and this illegality cannot he cured by Section 41:5 as the error is of a kind which goes to the root of the matter. Giving of reasons for making an order of dismissal of a complaint is a prerequisite of the order and absence of the reasons would make the order a nullity.[73]

The order passed under Section 203 could be challenged in revision. The question whether a suspect is entitled to hearing by the revisional court in a revision preferred by the complainant challenging an order of the Magistrate dismissing the complaint under Section 203 has been answered in the affirmative by the Supreme Court in *Manharibbai Muljibhai Kakadia* v. *Shaileshbhai Mohanbhai Pate!*[74].

The order of dismissal of a complaint under Section 203 is neither an order of discharge nor an order of acquittal. Therefore, the principle of *autrefois convict* or *autrefois acquit* incorporated in Section 300 is not applicable and a second complaint after the dismissal of the first one is competent.[75] Quite obviously, however, if a Magistrate has dismissed a complaint after careful consideration of the material before him, he is unlikely to find "sufficient cause for proceeding" with it on the second occasion; and even if the Magistrate who deals with the second complaint is different, the likelihood of his proceeding with it is not increased. Only in exceptional circumstances will a second complaint be proceeded with.[76] The exceptional circumstances may be like: *i)* where the previous order of dismissal was passed on an incomplete record, or *it)* where the previous order was the result of a misunderstanding of the nature of the complaint, or was manifestly absurd or unjust, or foolish, or *in)* where new facts are adduced in the second complaint which could not, with reasonable diligence, have been brought on the record in the previous proceeding.[77] Whether the entertaining of a second complaint on the same facts after the dismissal of the first one, would be an abuse of the process of court or whether it would be a step in the furtherance of justice is a question of fact depending on the circumstances in each case. ln the former situation the

72. *Utley Sir Singh* v. *Shakuntala Devi,* 1974 Cri LJ 187, iSS {Del}.

73. *Chandra Deo Singh* v. *Prokasb Chandra Bose,* (1963) 2 Cri lJ 397: AIR 1963 SC 1430; *Harnandan Das* v. *Atul Kumar Prasad,* {1925} 2.6 Cri Lj 1502: AIR .192.6 Par 57; *Ratanshah Kavasji* v. *Keki Behramshah,* {1945) 46 Cri Lj 434: AIR 1945 Bom 147; *An am a* v. *Bepin Behari,* 1957 Cri Lj 717: AIR 1957 Cal 383; *Rev. Father Abraham* v. Y.M. *Thomas,* 1989 Cri Lj 705 (Ker).

74. (2.012) 10 SCC 5x7, 533: (2015) i SCC (Cri) 218: 2013 Cri Lj 144.

75. *Rain Naram* v. *Panachand Jam,* (1949) 50 Cri Lj 324: AIR 1949 Pat 256.

76. *See,* 41st Report, p. 135, para. 16.14.

77. *Pram at ha Nath Tahtkdar* v. *Saroj Ran jan Sarkar,* {1962} 1 Cri LJ 770, 793: AIR 1962 SC 876. See, *Mira Lai v. State of U.P.,* (2009) 11 SCC 89: (2009} 3 SCC (Cri) 1247: 2009 Cri Lj 2849; *Poonam ChandJain* v. *Fazru,* {20.10} 2 SCC 631: {2010} 2 SCC {Cri} 1085: 2010 Cri Lj 1423.

judge shall dismiss the complaint as there would not be "sufficient ground for proceeding".

Issuing a summons or warrant

11.4

If the Magistrate taking cognizance of an offence considers that there is sufficient ground for proceeding, then

(i) if the case appears to be a summons case, he *shall* issue his summons for the attendance of the accused; or *{ii}* if the case appears to be a warrant case, he *may* issue a warrant, or if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) before some other Magistrate having jurisdiction. [S. 204(1)]

It is well-settled by a long catena of decisions that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and is only to be *prima facie* satisfied whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case.[78]

While Section 203 dealing with dismissal of a complaint makes a specific provision about recording of reasons and obliges the Magistrate to do so, Section 204 which deals with issue of process does not require the Magistrate to record a speaking order, and it would be quite a sufficient compliance with the provisions of law if it is found that the Magistrate has applied his mind to the facts of the case and has formed a judicial opinion that there is sufficient ground for proceeding with the case and for issuing process under a particular section.[79]

A warrant case and summons case have been defined in clauses (x) and *[w]* of Section 2.[80] A "warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years; and a "summons case" means a case relating to an offence, and not being a warrant case. Briefly speaking, while in summons case a Magistrate is required to issue a summons, in a warrant case he has discretion to issue either a warrant or a summons. Even in a

78. *Nagawwa* v. V.S. *Konjalgi,* (1976) 3 SCC 736: 1976 SCC (Cri) 507, 510: 1976 Cri Lj 1533; *see also,* cases given in *supra,* note 45, 46, 48, 49; *also see,* observations in *India Carat (P) Ltd.* v. *State of Karnataka,* (1989) x SCC 13 z: 1989 SCC (Cri) 306: 1989 Cri Lj 963; *Inder Raj Malik* v. *Sunita Malik,* 1986 Cri LJ 1510 (Dei).

79. *Gopal Chau ban* v. *Satya,* 1979 Cri Lj 44 6,450 (HP); see also. *Swam Anand* v. *Chief Judicial Magistrate,* 1977 Cri Lj 355, 357 (Ail). *But see* contra, *Udey Bir Singh* v. *Shakuntala Devi,* 1974 Cri Lj 187 (Dei); *jangtr Singh* v. *Bharpur Kaur,* 1976 Chand LR (Cri) 63 (P&H); *K.L. Nagpal v. Sat Prakash,* 1977 Chand LR 15Z (P&H); *Hatia Swam* v. *Chintamani Mishra,* 1990 Cri LJ 47 (Ori).

80. For the text of the clauses, *see supra,* para. 5.x.

summons case he may issue a warrant after recording his special reasons for doing so under Section 87. These matters have been already discussed in Chapter 5 dealing with steps to ensure accused's presence at his trial,[81] The discretion to issue a summons or warrant if there is sufficient ground for proceeding has been restricted by a mandatory provision contained in Section 204(2). It provides that no summons or warrant shall be issued against the accused under Section 204(1) until a list of the prosecution witnesses has been filed. The provision is mandatory. It is for protecting the interest of the accused person. Because of this provision the accused would be in a position to know on filing of such list of the prosecution witnesses, as to the witnesses who are supporting the prosecution case.[82] This would enable the accused to prepare himself for their cross-examination. Recently a different note has been struck regarding the mandatory nature of the provision. It has been observed:

> The object of this provision is not to introduce a requirement that goes to the root of the jurisdiction, ... but to serve a two-fold purpose: one to apprise the accused at the earliest opportunity of the persons who are likely to give evidence against him, and second, to scuttle any attempt on the part of the complainant subsequently to improve the state of evidence by made-up witnesses. This may give a valuable right to the accused but it is not certainly one which the law regards as fundamental or sacred in that the list of witnesses ... may be added to, modified or otherwise varied in the subsequent proceedings ... . [Under Ss. 242, 254, etc.][83]

Even if filing of a list contemplated by Section 204(2) is considered mandatory, the provisions contained in Section 465 have to be taken into consideration before declaring the issue of process as illegal. Therefore, unless the issue of process in such circumstances has resulted in failure of justice, it cannot be set aside.[84]

In respect of Section 204(2) it has been held that the names of witnesses can be given in the complaint itself and in that case no separate list of witnesses need be filed.[85] An additional list of witnesses can also be given later.[86]

The purpose of Section 204(2) is to convince the court that there are proper materials to support the case and to enable the accused to know in advance what are the materials that the complainant is likely to produce against him. If this purpose is served otherwise, the omission to file a list

81. *Void.*
82. *P. Dhanji Mauji* v. *G. Govind Jiua,* 1974 Cri LJ 2.41 (Guj); *Ram Naratn* v. *Bishamber Nath,* (1961) 1 Cri Lj 553: AIR 1961 Pun] 171; *Chaturbhuj* v. *Nabarkhan,* 1958 Cri LJ 50: AIR 195^ MP 2.8.
83. *Abdullah Bhai* v, *Gbulam Mohd1972* Cri LJ 277, 279 (j&K).
84. *Kanhu Ram* v. *Durga Ram,* 1980 Cri Lj 51S, 520 (HP).
85. *Bata Behera v. Devendranath,* 1980 Cri Lj 1353: AIR 1960 Ori 178; *Maniyani* v. *State of Kerala,* 1979 KLT 183.
86. *V.R. Shenoy* v. 5.A. *Prabhu,* 1967 Cri LJ 1517: AIR 1967 Ker 233.

of witnesses will not vitiate the proceedings. At the most the court may insist on a list of witnesses being filed and refuse to issue process before such list is made available.[87]

A special provision regarding the issue of process has been made where the proceedings are instituted upon a written complaint. Section 204(3) provides that in such a proceeding every summons or warrant issued shall be accompanied by a copy of such complaint. The object is to enable the accused to know precisely what the charge is against him. The provision appears to be directory and the copy of the written complaint should be supplied to the accused person before proceeding with the case.[88 89] It may here be mentioned that the accused is under a duty to obey the summons even though the copy of the complaint is not supplied along with the summons.

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The question whether a Magistrate can issue process in a case of which cognizance was taken by his predecessor has been answered in the affirmative.[90]

In order to ensure prompt payment of process fees and other fees, Section 204(4) provides:

> when by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

Power to dispense with the personal attendance of the accused

11.5

Section 205 empowers the Magistrate to dispense with the personal attendance of the accused person under certain circumstances. The section provides that whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. [S. 205(1)] But the Magistrate inquiring into or trying the case may in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and if necessary, enforce such attendance in the manner provided in the Code. [S. 205(2)]

It will be noticed that the power to dispense with the personal attendance of the accused is exercisable in any case where the Magistrate issues a summons in the first instance, and it is immaterial whether the case is a summons case or a warrant case. The courts have taken the view that the

87. *Madhsvan Nambiar* v. *Govindan,* 19S2 Cri Lj 685, 687 (Ker); see also, *Mourn* v. *Supt Special jail.* (1971) 3 SCC $36: 1972 SCC

88. *Prabbu Dayal Gobind Ram* v. *R. Mudgtl, 1966* Cri Lj 1045: AIR *1966* Punj

Jagarmatb v.

89. *Brahma Panda* v. *Howrah Municipality,* (1961) 2 Cri Lj 762: AIR 1961 Cai 648.

90. M.L. *Gulati v.j.L. Birmani,* 1986 Cri LJ 770 (Del).

power to dispense with the personal attendance of the accused under this section is limited to the first issue of process and that it cannot be exercised at any later stage. If the Magistrate finds it necessary at later stage to dispense with the personal attendance of the accused, he will have to act under and in accordance with the provisions of Section 317.[91]

The provisions to dispense with the personal attendance of the accused and to permit him to appear by his pleader are contained in Sections 205, 273 and 317. The scheme of the provisions is that a Magistrate has to dispense with the personal appearance of the accused and allow him to appear by his pleader except when the personal attendance of the accused before court is necessary in the interests of justice.[92] If for example a witness has to identify the accused then the Magistrate has to direct the accused to be present in court.[93]

In cases which are grievous in nature involving moral turpitude, personal attendance is the rule. But in cases which are technical in nature, which do not involve moral turpitude and where the sentence is only fine, exemption should be the rule.[94] The courts should insist upon the appearance of the accused only when it is in his interest to appear or when the court feels that his presence is necessary for the effective disposal of the case. In all trivial and technical cases where the accused are ladies, old and sickly persons, workers in factories, daily wage earners, other labourers and busy business people or industrialists, courts should invariably exercise discretion liberally to exempt such persons from personal attendance.[95] Where the offences alleged are of a serious nature and punishable with imprisonment for some length of time, the question of status of the accused person, while granting exemption, cannot be considered.[96] Although no special exception is created in favour of a *pardanashin* woman, discretion must be reasonably exercised by consideration of the social status and custom and also the nature of the offence. Ordinarily, exemption should be granted unless a strong prima facie case is made out.[97]

It is pertinent to note that even in cases where the court has dispensed with the personal attendance of the accused under Section 205(1) or Section 317 of the Code, the court cannot dispense with the examination

91. ***See,*** 41st Report, p. 138,

92rS. R.
Jhunjhu

93. N. ***Dinesan***

94. ***Erf an All*** v.

95. ***H.R.***
Indus

96.

97.

of the accused under clause *(b)* of Section 313 of the Code because such examination is mandatory.[1]

The examination of the accused should be in proper form.[2] Arguing that the provisions such as Sections 243(1), 247, 235(2) of the Code enabling accused's written statement to be acceptable, the Supreme Court ruled that an accused can be examined through his counsel provided the guidelines laid down therein are followed.[3 4 5]

Special summons in cases of petty offence

11.6

With a view to avoid unnecessary inconvenience to persons accused of petty offences and also to reduce to some extent congestion in Magistrates' Courts a special novel provision has been made by Section 20b.[4 5] The section reads as follows:

Special summons in case of petty

206. (1) If, in the opinion of a Magistrate taking cognizance of a petty offence, the case may be summarily disposed of under Section 260, '[or Section 261], the Magistrate shall, except where he is, for reasons to be recorded in writing of a contrary opinion, issue summons to the accused requiring him either to appear in person or by pleader before the Magistrate on a specified date, or if he desires to plead guilty to the charge without appearing before the Magistrate, to transmit before the specified date, by post or by messenger to the Magistrate, the said plea in writing and the amount of fine specified in the summons or if he desires to appear by pleader and to plead guilty to the charge through such pleader, to authorise, in writing, the pleader, to plead guilty to the charge on his behalf and to pay the fine through such pleader:

Provided that the amount of the fine specified in such summons shall not exceed [6][one thousand rupees],

(2) For the purposes of this section, "petty offence" means any offence punishable only with fine not exceeding one thousand rupees, but does not include any offence so punishable under the Motor Vehicles Act, 1939 (4 of 1939), or under any other law which provides for convicting the accused person in his absence on a plea of guilty.

"[(3) The State Government may, by notification, specially empower any Magistrate to exercise the powers conferred by sub-section (1) in relation to any offence which is compoundable under Section 320 or any offence punishable with imprisonment for a term

1. ***Usha K. filial*** v. ***Raj K. Srinivas,*** >1993} 5 $CC W93 SCC (Cri) 82.4: 1993 Cri Lj
2. ***Asraf Alt*** v. ***State of Assam,*** (2008) x6 SCC 318: (2010) 4 SCC (Cri) 27S: 2008 Cri Lj 4358. See also,
3. *Keys Mukherjee* v. *Magma Leasing Ltd.,* (2008) 8 SCC 447: (2008) 3 SCC (Cri) 537: 2008 Cri Lj 2597.
4. ***See,*** notes on ***cl.*** zn.
5. ***ins.*** by Act 25 of 2005, S. ***2o{a}*** (w.e.f. 23-6-2006).
6. ***Subs,*** for "one hundred rupees7' by Acr 25 of 2003, S. ***zo[b)*** (w.e.f.
7. ***Ins.*** by the CrPC (Amendment) Act, 197S, S. 18.

or with both where the Magistrate is of opinion that, having regard to the facts and circumstances of the case, the imposition of fine only would meet the ends of justice.]

An analysis of the section will bring out the following points:

(/) The section is applicable to such cases

(a) where the offence alleged is punishable only with fine up to ^1000; or

(b) where the offence alleged is compoundable under Section 320,[8] or is punishable with imprisonment up to 3 months or/and fine, and in the opinion of the Magistrate, specially empowered by the State Government to exercise powers in respect of such offences, the imposition of fine only would meet the ends of justice.

(ii) The special procedure provided by the section is applicable only in such cases where the Magistrate is of the opinion that the case may be summarily disposed of under Section 260[9] or Section *161.*

(Hi) Even if the above two conditions are satisfied, yet the section will not be applicable in a case where, for reasons to be recorded in writing, the Magistrate is not in favour of issuing a special summons under this section.

(iv) The special summons procedure will not apply in a case where the offence is punishable under the Motor Vehicles Act, 1988 (because similar procedure has been already provided under the MV Act), or under any other law which provides for convicting the accused person in his absence on a plea of guilt.

(v) The summons gives a choice to the accused person *a)* to appear in person or *b)* to appear by a pleader or *c)* to plead guilty to the charge without appearing before the Magistrate.

(vi) If the accused person chooses to plead guilty without appearing before the Magistrate, he is to transmit, within the specified time, the said plea in writing and the amount of fine mentioned in the summons.

(vit) If the accused person chooses to appear by pleader and to plead guilty through such pleader, he can do so by giving such authority to the pleader in writing and by paying the fine through such pleader. *(viii)* The amount of fine to be specified in the summons shall not be more than A 1000.

{ix) The offences mentioned in *(i)(b)* above may also be dealt with in the same manner as mentioned above only by a Magistrate specially empowered by the State Government in this behalf.

8. For the text of S. 320, *see infra,* para. 17.2.
9. S. *260* empowers certain Magistrates to try certain

The Magistrate has thus wide discretion to dispose of petty cases quickly by way of summary procedure. Now Section 261 has also been added. The amount of fine imposable has been raised to [A] 1000.

Supply to the accused of copies of statements and other documents **11.7**

(a) Where the proceeding is instituted on a police report.—As earlier mentioned, where a police officer investigating the case finds it convenient to do so, he may furnish to the accused copies of all or any of the documents referred to in Section 173(5)2° According to Section 207 the Magistrate is under an imperative duty to furnish to the accused, free of cost, copies of statements made to the police and of other documents to be relied upon by the prosecution. Section 207 reads as follows:

Supply to the accused of copy of police report and other documents

207. In any case where the proceeding has been instituted on a police report,
the Magistrate shall without delay furnish to the accused, free of cost, a copy
of each of the following:—

(i) the police report;

(ii) the first information report recorded under Section 154;

(Hi) the statements recorded under sub-section (3} of Section 161 of all persons whom the prosecution proposes to examine as its witnesses,
excluding therefrom any part in regard to which a request for such
exclusion has been made by the police officer under sub-section (6) of
Section 173;

{tv) the confessions and statements, if any, recorded under Section 164;

{v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173: Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause *{Hi)* and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause *{v)* is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in

10. ***See supra,*** S. 173(1}, para. 8.14(c).
31. ***Gurbachan Singh*** v. ***State of Punjab,*** 1957 Cri Lj 1009: AIR 1957 SC 623; ***also see,*** the observations in ***Geevargbese*** v. ***Philipose,*** 1987 Cri Lj 1605 (Ker); ***Brojendra Nath Kolay*** v. ***State,*** 1994 Cra LJ 1194 (Cal), ***See also,*** discussions in ***Bharat Parikh*** v. ***CBL*** (2008) 10 SCC 109: (2008) 3 SCC (Cri) 609: 2008 Cri IJ 3540;

The right conferred on the accused is confined to the documents enlisted in the section and does not extend to other documents. From the language of Section 2,07, it appears that the right to have copies of statements recorded by the police is only in respect of statements recorded in the same case, and not in respect of statements recorded in any other case.[12]

In a case instituted on a complaint which was investigated by the Central Bureau of Investigation, the accused was held entitled to disclosure of information. The court said that the accused person would have the right albeit a non-statutory right, to complete disclosure of material at the threshold of a trial, even in cases instituted otherwise than on a police report if the proceedings were preceded by police investigation.[13]

At the commencement of the trial in a warrant case it is the duty of the Magistrate conducting the trial to satisfy himself that he has complied with the provisions of Section 207. [S. 238] In a summons case instituted on a police report no such duty has been specifically cast on the Magistrate conducting the trial. However, free copies have to be supplied to the accused in such cases by the Magistrate in view of the imperative duty created by Section 207.[14] Similarly in a case exclusively triable by a Court of Session such a duty is not imposed by any express provision in the Code on the Court of Session. However, if such a duty is implied in a summons case, a fortiori, it is very much implied in a case exclusively triable by a Court of Session.

If the copies of statements, etc. are not supplied to the accused person as required by Section 207, it is undoubtedly a serious irregularity; however, this irregularity in itself will not vitiate trial. It will have to be seen whether the omission to supply copies has in fact occasioned a prejudice to the accused person in his defence .[15] For that purpose the appellate court must scrutinise the police record for itself, and if it finds that there are discrepancies between the police statements and the depositions of the witnesses at the trial and that these discrepancies are of a serious nature, prejudice must be held to have been established, because in such a case the accused person has been denied the opportunity of discrediting those witnesses by bringing on record the contradictions which exist between their evidence in court and their earlier statements recorded by the police. In such a case conviction of the accused person must be set aside, and a fair retrial after furnishing to the accused all the copies to which he is entitled must be ordered.[16]

12. *Gurbac*
13. *Viniyoga*
14. *Veerappa, re,*
15. *See supra,* S.
16. *See,* observations in

(b) Where the proceeding, in respect of an offence exclusively triable by the Court of Session, is instituted otherwise than on a police report.—In cases where cognizance of the offence has been taken otherwise than on a police report, the case is not ordinarily investigated by the police and naturally there are no statements recorded by the police. Therefore, the valuable right given to the accused by Section 207 regarding the supply of copies would not be available in such cases. In the absence of any preliminary inquiry preceding trial, and when no police record is available to the accused person before his trial, it might cause considerable hardship to the accused to prepare himself for his defence, particularly when the offence alleged is a serious one exclusively triable by the Court of Session. Section 208 tries to remove this hardship and enables the accused to know the case made against him and to prepare for his defence. Section 208 is as follows:

Supply of copies of statements and documents to accused in other cases triable by Court

208. Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under Section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:—

(i) the statements recorded under Section 200 or Section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under Section 161 or Section 164;

Commitment of case to Court of Session

11.8

Certain offences are exclusively triable by the Court of Session according to Section 26 read with the First Schedule. The Court of Session, however, cannot directly take cognizance of these offences and it can deal with any such case only when the same is committed by the Magistrate taking cognizance of such an offence. Section 209 requires such a Magistrate to perform certain preliminary functions and then to commit the case formally to the Court of Session. Section 209 reads as follows:

***Commitment of case** to Court of Session when offence is triable exclusively by it*

209. When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall—

[17] [(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may

Maharashtra, 1979 Cri Lj 528 (Bom).

17. *Subs,* by the CrFC (Amendment) Act, 1978, S. 19.

subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made];

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

id) notify the Public Prosecutor of the commitment of the case to the Court of Session.

Section 209 provides for commitment of a case to a Court of Session only when the offence is triable exclusively by it. But this section must be read along with Section 323[18] which is supplementary to it. A Magistrate is given power under Section 323, in addition to his power under Section 209, to commit a case which ought to be tried by a Court of Session.[19] [20]

Under the section the Magistrate is only to examine the police report and other documents mentioned in Section *zojfox* Section 208 as the case may be) and find out whether the facts stated in the report make out an offence triable exclusively by the Court of Session. Once he reaches the conclusion that the facts alleged in the report make out an offence triable exclusively by a Court of Session, he is to do no more and commit the case to the Court of Session. In forming the above opinion the Magistrate is not to weigh the evidence and the probabilities in the case. He is not required to hear the

i 20

accused.

It has been held by the Supreme Court that after the committal of some accused to the Sessions Court on the basis of police report, the complainant cannot by way of complaint petition under Section 200 get other accused arrayed by the Sessions Court.[21]

The Magistrate in order to formulate his opinion as to whether or not an offence exclusively triable by the Court of Session is made out has to consider the police report or the complaint submitted to him for taking cognizance of the offence. In order to arrive at a prima facie finding the Magistrate has to consider the evidence recorded during the investigation, and he is not to act in an automatic manner so as to commit every case to the Court of Session. He has to consider ail that evidence at its face value, but it is not open to him to hold a mini trial for arriving at the abovesaid finding.[22] The intention of the legislature will be defeated if the section is interpreted to allow a dress rehearsal of a trial. In the

18. For the text
19. ***State*** v. ***Somasekhara***
20. ***State v. Jai Ram,***
21. See, disc
22. *State of*

view of the Supreme Court, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. If by error a wrong section of the IPC is quoted, he may look into that aspect. If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 to discharge the accused.[23]

If on a plain reading of the material on record it does not appear to the judicial mind that any such offence exclusively triable by the Court of Session exists, or even prima facie or on the face of the record no such offence is disclosed at all, then in that limited field and contingency the Magistrate may decline to commit the case. Annexing a wrong label or application of wrong section on the face of the record would be one of such contingencies. Merely because the Sessions Court is vested with the discretionary powers to set aside a committal under Section 228(i)(a) and to send the case back, the Magistrate is not obliged to almost mechanically commit a case even if the offence does not appear to him to be triable exclusively by the Court of Session.[24]

It is evident from Section 209 that no committal can take place without the presence of the accused.[25] This requirement of the presence of the accused is not, however, with a view to give him an opportunity to make any representation, but only for the purpose of committing him to the Court of Session. It has been held that non-production of the accused before the Magistrate at the time of the committal is a mere irregularity and is curable under Section 465(1).[26]

Though Section 209 does not expressly say what should be done by the Magistrate if the offence does not appear to be one exclusively triable by a Court of Session, he cannot discharge the accused[27], but shall proceed under Chapter XIX or Chapter XX of the Code as he is deemed to have taken cognizance of offences falling under any one of those chapters.[28]

The Magistrate acting under Section 209 has no power to take oral evidence save where a specific provision like Section 306 enjoins him to do so. According to Section 306 the Magistrate taking cognizance of the offence is required to examine the person accepting the tender of pardon made

23. *Sanjay Gandhi* v. *Union of India,* (1978) 2
24. *Dattatraya Samantw State of Maharashtra,* 1981 Cri Lj 1819, 182.2.-23 (Bom).
25. P.R. *Murugaiyan* v. *J.P. Nadar,* 1977 Cri Lj 1700, 1705 (Mad); *Izhar Ahmad* v. *State,* 1978 Cri LJ 58, 60 (Ail): *Ram Kishan* v. *Prem*
26. *Onkaraingh* v. *State, 1976* Cri Lj 1774, 1775 (All).
27. *P.R. Murugaiyan* v. *J.P. Nadar,* 1977 Cri Lj 1700, 1708 (Mad); *Sanjay Gandhi* v. *Union of India,* (1978) 2 SCC 39: 1978 SCC (Cri)
28. These chapters deal with trial of warrant cases and summons cases by Magistrates.

under Section 306(1) ***viz.*** the approver, as a witness. In other words, the examination of the approver is a condition precedent for the committal Therefore, Section 306[29][30][31] shouid be read in conjunction with Section 209. It has been held that the Chief Judicial Magistrate can tender pardon at any stage of the investigation or inquiry or trial. So even after committal pardon can be granted by the Chief Judicial Magistrate.[50] Any violation of the mandatory provisions of Section 306, sub-sections (4) and (5), by the Magistrate taking cognizance of the offence, clearly amounts to an illegality which would vitiate the entire committal proceedings.[51] After committing the police case no detailed inquiry need be conducted on the complaint case before passing the committal order by the Magistrate.[29][30][31][32]

11.9 Consolidation of cases instituted on a police report and on a complaint

Sometimes when a serious case is under investigation by the police, some of the persons concerned may file a complaint and quickly get an order of acquittal either by collusion or otherwise. Thereupon, the investigation of the case would become infructuous leading to miscarriage of justice in some cases.[33] To avoid this Section 210 makes provision for the consolidation of cases in respect of the same offence. The section is intended to secure that private complaints do not interfere with the course of justice.[34] Section 210 is as follows:

Procedure to be followed when there is a complaint case and police investigation in respect of the same offence

210. (1) When in a case instituted otherwise than on a police report {hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

{2) If a report is made by the investigating police officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3} If the police report does not relate to any accused in the complaint case or if the

29. Fo
30. Sures *b Chandra*
31. ***R***
32. *State of Assam* v.
33. Joint Committee
34. *Ibid.*

Provision for stay of proceedings of the complaint case is made under Section 2x0(1) only for the purpose of calling for a report in the matter from the police officer conducting the investigation to examine whether or not to proceed with the complaint case in the facts and circumstances of the case and in view of the provisions in sub-sections (2) and (3) of Section 2x0. If the said report is not submitted within a reasonable time, it is not expected of the court to keep the complaint case shelved for an indefinite period helplessly waiting all the time for the investigating agency to file its report as and when it chooses to do so.[35]

In Section 201(1} the word "offence" has been used to denote the occurrence, the incident or the event. This is clear from the words which follow *viz.,* "which is the subject-matter of the inquiry". But the same meaning cannot be given to the word "offence" used in Section 210(2). There it is used in the restricted sense of violation of law. So for clubbing the two cases for trial it is enough that cognizance is taken by the Magistrate of any offence against any accused in the complaint case on the report of the police who investigated the occurrence which led to the complaint case.[36] If on the other hand, it is insisted that all the offences taken cognizance of in the complaint case must be there in the case registered on the police report, that will only defeat the very purpose of Section 2x0 itself.[37] It is to prevent private complainants from interfering with the course of justice that Section 210 has been enacted.[38 39]

While considering the effect of Section 210, the Delhi High Court has observed in *State* v. *Har Namin*[m9]*:*

> One of the ingredients of sub-section (1) is that the offence inquired into or tried by the Magistrate in the complaint case should also be under police investigation. The word 'offence' has been defined in Section ***2****(n)* as 'any act or omission made punishable by any law for the time being in force... In other words, it is the act or omission which has to be common. As long as the facts under investigation by the police include the facts mentioned in the complaint case, then it will make no difference if the police come to the conclusion that offence not mentioned in the complaint have been committed by the accused.

Once the criteria laid down in sub-section (1) are satisfied then if the Magistrate takes cognizance of "any offence" against "any person who is an accused in the complaint case" on the basis of police report, it is the duty of the Magistrate under sub-section {2) to try the two cases together as if they were instituted on a police report.

35. *Mam Chand* v. *State of Haryana,* 19 Si Cri LJ 190 (PScH).
36. *Kadiresan* v. *Kasim,* 1987 Cri LJ 1225 (Mad); *see,* observations in *T.S, Sawhney v. State,* 1987 Cri LJ 1079, 1083 (Del).
37. *But see,* observations in T.S. *Sawhney* v. *State,* 1987 Cri LJ 1079, 1084 (Del); *Kariappa* v. *State of Karnataka,* 1989 Cri LJ 1157
38. *Joseph* v. *Joseph,* 1982 Cri LJ 595, 596-97(Ker).
39. 1076 Cri LJ 562, 564 (Del)

Bail

Object and meaning of bail *12.1*

The object of arrest and detention of the accused person is primarily to secure his appearance at the time of trial and to ensure that in case he is found guilty he is available to receive the sentence. If his presence at the trial could be reasonably ensured otherwise than by his arrest and detention, it would be unjust and unfair to deprive the accused of his liberty during the pendency of the criminal proceedings against him. The provisions regarding the issue of summons or those relating to the arrest of the accused person under a warrant or without a warrant or those relating to the release of the accused person on bail, are all aimed at ensuring the presence of the accused at his trial but without unreasonably and unjustifiably interfering with his liberty. Provisions regarding issue of summons or of a warrant or those relating to arrest without any warrant have been already discussed in Chapter 5. It is, therefore, proposed to consider in this chapter the various provisions relating to release of a person on bail.

The release on bail is crucial to the accused as the consequences of pre-trial detention are given. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.[1]

Where a person is accused of a serious crime arid is likely to be convicted and punished severely for such a crime, he would be prone to abscond or jump bail in order to avoid the trial and consequential sentence. If such

1. *Moti Rai?i* v. *State of M.P.*. (1978) 4 SCC 47: 1978 SCC (Cri) 485, 490: 1978 Cri LJ 1703. 170 *6.*

person is under arrest, it would be rather unwise to grant him bail and restore his liberty. Further, where the arrested person, if released on bail, is likely to put obstructions in having a fair trial by destroying evidence or by tampering with the prosecution witnesses, or is likely to commit more offences during the period of his release on bail, it would be improper to release such a person on bail. On the other hand, where there are no such risks involved in the release of the arrested person, it would be cruel and unjust to deny him bail. The law of bails "has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence, *viz.,* the presumption of innocence of an accused till he is found guilty"[2].

In order to subserve the abovesaid objectives, the legislature in its wisdom has given some precise directions for granting or not granting bail. Where the legislature allows discretion in the grant of bail, the discretion is to be exercised according to the guidelines provided by law; in addition the courts have evolved certain norms for the proper exercise of such discretion. The present chapter deals with these matters. It also deals with the circumstances in which the bail already granted can be cancelled.

There is no definition of bail in the Code, although the terms "bailable offence" and "non-bailable offence" have been defined.[3] "Bail" has been defined in the *Law Lexicon* as security for the appearance of the accused person on giving which he is released pending trial or investigation.[4] What is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court".[5] The Supreme Court has held that bail covers both release on one's own bond, with or without sureties.[6] The questions when sureties should be demanded and what sum should be insisted upon are dependent on variables.

12.2 Bailable and non-bailable offences

The Code has classified all offences into "bailable" and "non-bailable" offences. According to Section *z(a),* "bailable offence" means an offence

2. *Supt. & Remembrancer of Legal Affairs* v. *Amiya Kumar* Roy *Cboudhury,* (1974) 78 OWN 320, 325. Also see, *Sanjay Chandra* v. CB/, (2012) 1 SCC 40: (2012) 1 SCC (Cri) *26:* 2012 Cri LJ 702.
3. *See,* S. *z(a); Mott Ram* v. *State of M.P.,* (1978} 4 SCC 47-. 1978 SCC (Cri) 485, 490: 1978 Cri Lj 1703, 1706.
4. *Govind Prasad* v. *State ofW.B.,* 1975 Cri Lj 1249, 1255 (Cal).
5. *Black's Law Dictionary* {4th Edit.) 177. Also see, *Yam an Narain Ghiya* v. *State of Rajasthan,* (2009} 2 SCC 281: (2009) 1 SCC (Cri) 745: 2009 Cri LJ 1311.
6. *Moti Ram* v. *State ofM.P.,* (1978) 4 SCC 47: 1978 SCC (Cri) 485, 490: .1978 Cri Lj 1703, 1706.

which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence. It will be seen that the Code has not given any test or criterion to determine whether any particular offence is bailable or non-bailable. It all depends upon whether it has been shown as bailable or non-bailable in the First Schedule of the Code. That schedule refers to all the offences under the Penal Code, x860 (IPC) and puts them into bailable and non-bailable categories. The analysis of the relevant provisions of the schedule would show that the basis of this categorisation rests on diverse considerations. However, it can be generally stated that all serious offences, *i.e.* offences punishable with imprisonment for three years or more, have been considered as "non-bailable offences". But there are exceptions on either side.[7] In the case of offences under laws other than IPC, as it is not expedient to list all the offences under the laws for the time being in force and to change the schedule every time a new penal law is passed, the abovesaid broad rule has been adopted in the schedule and has been made applicable in case of such offences under the other laws.

It may, however, be noted that this general rule can be suitably modified according to the specific needs by making a special provision in law and declaring a particular offence as bailable or non-bailable.

If a person accused of a bailable offence is arrested or detained without warrant, he has a right to be released on bail. But if the offence is nonbailable that does not mean that the person accused of such offence shall not be released on bail; but here in such a case bail is not a matter of right, but only a privilege to be granted at the discretion of the court. The classification of offences into bailable and non-bailable has been devised for making a threshold decision as to whether the accused person should be released on bail. If this threshold decision is not in his favour, further probing is necessitated before making a decision as to his release on bail.

Circumstances in which release on bail is imperative **12.3**

(a) Cases other than those of non-bailable offences.—Section 436 provides that when a person not accused of a non-bailable offence is arrested or detained he can, as of right, claim to be released on bail. The section covers all cases of persons accused of bailable offences, cases of persons though not accused of any offence but against whom security proceedings have been initiated under Chapter VIII of the Code, and all other cases of arrest and detention which are not in respect of any non-baiiable offence.

7. While expressing a doubt as to the supposed basis for the categorisation, the Supreme Court has observed, "On this basis it

In what cases bail to be taken

Section 436 reads as follows:

436. {1} When any person other than a person accused of a non-bailabie offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may,[8] [9][and shall, if such person is indigent and is unable to furnish surety] instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

^*[Explanation*.—Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso:]

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of Section ***116*** [8] [*] [10][or Section 446-A].

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under Section 446,

While this section entitles a person other than a person accused of a non-bailable offence to be released on bail, it may be recalled that Section 50(2) makes it obligatory for a police officer arresting such a person without a warrant to inform him of his right to be released on bail,[11] As soon as it appears that the accused person is prepared to give bail, the police officer or the court, before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable.[12] It would even be open to the officer or the court to discharge

8. *Subs,* by Act 25 of 2005, S. 35(d), for "may, instead of taking bail" (w.e.f.
2. *bis.* by Act 25 of 2005, S. 35(A) (w.e.f.
10. *Ins.* by Act 63 of 1980, S. 4 (w.e.f.
11. *See supra,* para. *6^{b}.*
12. *Tatab Haji Hussain* v. *Madhukar Pursbottam*
13. *Monit Malhotra* v. *State of Rajasthan,*

court.[14] The court added that no party could be allowed to interfere with an order passed by the Magistrate in view of enabling provision contained in clause *(b)* of Section 209 under which the committal Magistrate has been empowered to grant bail until conclusion of the trial, which power was otherwise restricted to grant of bail by him during pendency of committal proceedings under clause *(a)* of Section 209.

The word "appears" in Section 436(1) is wide enough to include voluntary appearance of the person accused of an offence even where no summons or warrant has been issued against him. There is nothing in Section 436 either to exclude voluntary appearance or to suggest that the appearance of the accused must be in obedience to a process issued by the court. The surrender and the physical presence of the accused with submission to the jurisdiction and orders of the court is judicial custody, and the accused may be granted bail and released from such custody.[15]

The second proviso to Section 436 saves Section 116(3) and Section 446- A. According to Section 116(3) a person against whom security proceedings for keeping peace or maintaining good behaviour have been started may be detained in custody if he fails to furnish an interim bond as required by the court in such proceedings. Section 116(3) has been given an overriding effect and the general rule regarding release on bail contained in Section 436(1) will not affect it. Similarly, the provision contained in Section 446-A[16] regarding the forfeiture and cancellation of the bond on breach of any condition and consequent constraint imposed on fresh release on bail in the same case, will remain unaffected by the general rule as to release on bail contained in Section 436(1).

The right to be released on bail under Section 436(1) cannot be nullified indirectly by fixing too high the amount of bond or bail-bond to be furnished by the person seeking release. In such cases after sometime the accused could move application for reconsideration and then it should be possible for the court to grant bail as it may not involve review of the Magistrate's order because with the passage of time at least some of the factors must have changed and it might be a de novo consideration.[17] Section 440(1) specifically provides that the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive. Further, Section 440(2) empowers the High Court and the Court of Session to direct, if found necessary, that the bail required by a police officer or Magistrate be reduced. Section 440 or 441 or 445 does not empower the Magistrate to demand a cash security, but may

14. *Haji Mohd.* \V4sim v. *State ofU.P.,* 1992. Cri Lj 12.99 (All).
15. *B. Narayanappa* v. *State of Karnataka,* 1982 Cri Lj 1334 (Kant); *KandrmaUa Koteswara Kao* v. *State of A.P.,* 1982 Cri LJ
16. *See infra,* para. 12.13.
17. *Swan Kher Gulsan* v. *Collector of Customs,* 1993 Cri Lj 3569

permit an accused person to deposit a sum of money in lieu of executing a personal bond and giving surety of some person.[18] Though there is no specific provision for appeal against the orders refusing to grant bail under Section 436(1), *the High Court or the Court of Session can be moved under Section 439 for bail.* Moreover, refusal to grant bail in contravention of Section 436 will make the detention illegal and the police officer causing such detention may be held guilty of wrongful confinement under Section 342 IPC.[19]

Sub-section (2) of Section 436 makes a provision to the effect that a person who absconds or has broken the condition of his bail-bond when he was released on bail in a bailable case on a previous occasion, shall not, as of right, be entitled to bail when brought to court on any subsequent date even though the offence may be bailable.[20] Moreover, according to Section 446-A, the bond executed by such person as well as the bond (if any) executed by his surety shall stand cancelled; and thereafter, such a person in that case shall not be released only on his own bond if it is found that there was no sufficient cause for the failure of the person bound by the bond to comply with its conditions. Further, if a person released on bail under Section 436(1) indulges in acts which are entirely subversive of a fair trial in the court, the High Court or the Court of Session may cancel his bail and commit him to custody.[21] [22]

The amendment to Section 436 obligates the court or the police officer to release a person on his own surety if he is really indigent. The explanation added after the proviso provides the key for the court to ascertain the capability of the accused to provide surety. It lays down that if he is incapable of providing surety for a week after his arrest, that may be an indication of his being indigent. If the person thus released does not turn up in the court he may be punished with imprisonment for a term which may extend to one year or with fine or with both under Section 229-A IPC inserted in 2006.

In *State of Haryana* v. *Dinesh Kumar*[22], while considering the question what constitutes "arrest" and "custody" in relation to a criminal proceeding, the Supreme Court held that it may not be altogether unreasonable to expect a layman to construe that he had never been arrested on his appearing before the court and being granted bail immediately. The position would have been different, had the person concerned not been released on bail.

The new Section 436-A envisages the release of the accused on bail on his own surety if he has served half of the maximum term prescribed for

18. N. *Sasikala* v. *Directorate of*
19. *Dkarmu Naik* v. *Rabindranath*
20. Notes on els. 446-49.
21. *See,* S. 439(2).
22. (2008) 3 SCO 222.

that offence for which death is not one of the prescribed punishment. In such cases also the prosecution should be heard and on recording the reasons the court may order continued detention beyond one half of the said maximum or release him.

In no case a person be detained beyond the maximum period prescribed for the offence. If delay was, however, caused by the accused the period may not be computed as aforesaid.[23] [24] [25]

(b) *Right to be released on bail if investigations are not completed within the prescribed number of days.*—Whenever an accused person is arrested and detained in custody by the police during investigation and it appears that the investigation cannot be completed within 2.4 hours as fixed by Section 57, the accused person must be forwarded to a judicial Magistrate. The Magistrate to whom the accused is so forwarded may from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding 15 days in the whole. There is, however, no obligation on the part of the Magistrate to grant remand as a matter of course. The police has to make out a case for that.[24] [25] It is also not proper for the court to extend the period of judicial custody without insisting on the production of the accused.[2]> It has been ruled that request for remand can be opposed by an application and prayer for bail instantly even when some application for bail moved earlier is pending and posted for a future date.[26] If further detention of the accused person becomes necessary for the completion of the investigation, the Magistrate may authorise the detention of the accused person otherwise than in custody of the police. But the total period of detention in such a case (including the abovementioned period of 15 days) shall not exceed 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of 10 years or more; and such period of detention shall not exceed *60* days where the investigation relates to any other offence. On expiry of this period of 90 days or 60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail; and every person so released on bail shall be deemed to be so released under the provisions of Chapter XXXIII of the Code for the purposes of that chapter, [para. (a} to proviso to S. 167(a)] This provision is applicable irrespective of the fact that the offence of which the detained person is accused of is non-bail- able or the case is such that the bail cannot be granted according to the

23. *See,* the amendments effected by Code of Criminal Procedure
24. *State of (Gujarat* v, *Swan n Amu r Jyoti Shya m,* 1989 Cri LJ 501
25. *Subbash* v. *State of M.P.,* 1989 Cri LJ 1553 (MP); *Rabindra Rai* v.
26. *K.K. Girdhar* v. M.S. *Kathuria,* 1989 Cri LJ 1094

provisions of Chapter XXXIII of the Code dealing with bail and bonds. "If it is not possible to complete the investigation within a period of 60 days {or 90 days, as the case may be), then even in serious and ghastly types of crimes the accused will be entitled to be released on bail."[27] This right does not revive only because a further investigation remains pending within the meaning of Section 173(8) of the Code.[28] In cases involving more accused it may not be possible for some of the accused to adopt delaying tactics and thus get the benefit of proviso to Section 167(a).[29]

The right or the entitlement conferred on the accused to be released on bail after 90 days (or 60 days, as the case may be), must be considered to be an absolute right, subject of course to the cancellation of the bail if the requirements of Section 437(5) are satisfied.[30][31][32] The Supreme Court has held that the order for release on bail is not extinguished or defeated by discharge of surety or lapse of time.[31][32] Nor is it defeated by the filing of charge- sheet or by remand to custody under Section 309(2).^ It has also been held that constructive res judicata could not be applicable to bail applications.[33]

Bail under the proviso to Section 167 would, however, not be available to the accused who makes the application on the submission of the report after 90 days.[34] However, if the application is made after 90 days but before the submission of the report, the accused may be granted bail.[35]

The object of this provision appears to be to put pressure on the investigating agency to complete the investigation expeditiously and within a reasonable time. This rigid mandatory provision, however, appears to be somewhat in direct conflict with the basic policies underlying the law of bail.

It may be noted that once the bail is granted under the above provision [S. 167(2)] the provisions of Chapter XXXIII of the Code have been made applicable for subsequent dealing with bail matters. For instance,

27. *Miatabar Farida v. State of Orissa,* {1975) 2 SCO 2,20: 1975 SCO (Cri) 484, 489: 1975 Cri Lj 1212, 1216. The Supreme Court also made a pertinent and interesting observation: "Such a law may be a 'paradise for the criminals', but surely it would not be so, as sometimes it is supposed to be, because of the courts. It would be so under the command of the Legislature." *Ibid,* 489.

28. D *mesh Dalmia* v. *CBI,* (2007} 8 SCC 770: (2008) 1SCC (Cri) -*36):* 2008 Cri

29. *Shankar Ram* v. *State,* 1986 Cri Lj 707 (Pat).

30. *Babubhai Parshottamdas Patel* v. *State of Gujarat,* 1982 Cri Lj 284, 295

31. *Raghubir Singh* v. *State of Bihar,* {1986) 4 SCC 481: 19S6

32. *fagdisb* v. *State of M.P.,* 1989 Cri Lj 531 (MP).

33. *Gama* v. *State of U.P.,* 1987 Cri LJ 242 (All).

34. *Nawal Sabni* v. *State of Bihar,* 1989 Cri Lj 733 (Pat); *Sttrajmal Kanaiyalal*

35. *Gurmit Kaurv. State of Punjab,* 1989 Cri Lj 1609 (P&H); *Rajnikant Jivanlal* v. *Intelligence Officer, Narcotic Control*

the court can cancel the bail under Section 437(5) as if the bail was originally granted under Chapter XXXIII of the Code.[36] This legal fiction may enable the court to exercise judicial discretion in cancelling the bail in the granting of which it had no discretion whatsoever. In a case where it is found that the person released on bail under the mandatory provision of proviso *(a)* to Section 167(2) is misusing his freedom by tampering with the prosecution witnesses or by attempting to flee from justice by absconding, the bail may rightly be cancelled in view of this legal fiction.

Staying of the operation of the bail order has been resorted to. The power to do this has been located under Section 482. Holding the power under Section 439(2) to cancel bail independent of Section 397, it is argued, power to suspend which is ancillary to power to cancel is inherent in the High Court under Section 482.[37]

While computing the total period of 90 or 60 days referred to in proviso *(a)* to sub-section (2) of Section 167, the period of detention under Section 57 of the Code has to be excluded.[38] Where the Magistrate grants remand under Section 167, the custody thereafter is under the orders of the Magistrate. Therefore, while computing the abovesaid period of 90 or 60 days, the day on which custody is granted by the Magistrate cannot be excluded.[39]

There have been differing views with regard to the computation of the period of 90 or 60 days, as the case may be. While one view preferred to count the period from the day of arrest, the other view held that it should be counted from the day of remand by the Magistrate.[40] The Supreme Court has resolved the conflict by upholding the latter view.[41] In computing the period of 90 days one of the days on either side, he. the day of judicial custody or the date of submission of "challan", has to be excluded as required under Sections 9 and 10, General Clauses Act. And clear 90 days have to expire before the right to bail begins.[42]

The question whether in a case where the charge-sheet has been submitted within the statutory period of 90 days, an accused is entitled to be released on bail if cognizance is not taken on submission of the

36. *Kapoor Singh* v. *State of Haryana,* 1975 Cri LJ 1007 (P&H); *also see* observations in *Gurmit Kaurv. State of Punjab,* 1989 Cri LJ 1609 (P&H); *Rajnikant Jivanlal* v. *Intelligence Officer, Narcotic Control*
37. *Court on its own Motion* v. *Vishnu Pandit,* 1995 Cri LJ 20 25 (Del) .
38. ***Tarsem Kumar*** v. ***State,*** 1975 Cri LJ 1303 (Del); L.P. ***Chawla*** v. ***Murari,*** 1976 Cri LJ 212, 213 (Del).
39. *L.R. Chawla* v. *Murari,* 1976 Cri Lj *ziz,* 213 (Del); *Batna Ram* v. *State ofH.P.,* 1980 Cri LJ 748 (HP); *Jai Singh* v. *State of*
40. *Jagdish* v, *State of M. P.,* 1984 Cri Lj 79 (MP); *N. Sureya Reddy* v. *State of Orissa,* 1985 Cri Lj 939 (Ori); *Peroz v. State,* 1986 Cri LJ 439 (Pat);
41. ***Chaganti Satysnarayana*** v. ***State of A.P.,*** (1986) 3 SCC 141: 1986 SCC
42. ***State of M..P.*** v. ***Rustam,*** 1995 Supp (3) SCC 221: 1995 SCC (Cri)

charge-sheet, has been answered in the negative.[43] The period of investigation would come to an end the moment the police report is submitted.[44] Question of bail arises when the police report is not submitted within the stipulated period.

It has also been held that it is only the police custody which will be taken into consideration; when an accused was held in custody by the air force authorities before handing over to the police, that period of detention was not counted.[45] However, arrest and detention by customs officer were treated as police custody.[46 47] In *Directorate of Enforcement* v. *Deepak Mabajan*[47], the Supreme Court held that a person accused of an offence under FERA or Customs Act shall be entitled to remand under Section 167(2). The Magistrate can take the accused into custody on his being satisfied of three preliminary conditions, namely, 1) the arresting officer is legally competent to make the arrest; 2) that the particulars of the arrest or the accusation for which the person is arrested or other grounds for such arrests do exist and are well founded; and 3) that the provisions of the Special Act in regard to the arrest of the person and the production of the arrestee serve the purpose of Section 167(1).

In cases where the investigations cannot be completed within 24 hours and no judicial Magistrate is available, then, according to Section 167(2- A), the arrested accused person can be produced before an Executive Magistrate who may order the detention of the accused person in custody for a term not exceeding seven days in the aggregate. This provision has been already discussed in Chapter 8 (para. 8.13} and need not be discussed all over again.

(c) *No reasonable grounds for believing the accused guilty of a nonbailable offence but sufficient grounds for ftirther inquiry.*—When there are no reasonable grounds to believe that the accused was involved in the commission of a *non-bailable* offence, the accused shall be *released on bail* under Section 436. A somewhat similar situation is contemplated by Section 437(2). When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, and if it appears to such officer or court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but there are sufficient grounds for further inquiry into

43. *Rabindra Rai* v. *State of Bihar,* 19S4
44. *See* observations in *State of U.P.* v. *Lakshmi Brahman,*
45. *S.K. Nair* v. *State of Punjab,* 1984 Cri LJ
46. *M.K. Ayoob* v. *Supt., Customs Intelligence*
47. {1994} 3 SCC 440: 1994 SCC (Cri) 785.

his alleged guilt, then, according to Section 437(2), the accused *shall,* subject to the provisions of Section 446-A and pending such inquiry, *be released on bail,* or, at the discretion of such officer or court, on the execution by him of a bond without sureties for his appearance. An officer or a court releasing any person on bail under this provision is required to record his or its reasons for doing so. [S. 437(4)]

(d) *Trial not concluded within 60 days.*—If, in any case triable by a Magistrate, the trial of a person accused of any "non-bailable offence" is not concluded within a period of 60 days from the first date fixed for taking evidence in the case, such person *shall, if he is in custody during the whole of the said period, be released on bail* to the satisfaction of the Magistrate, unless for reasons to be recorded in writing the Magistrate otherwise directs. [S. 437(6)] This provision has been enacted in order to avoid hardship to accused persons in non-bailable cases where the proceedings are prolonged unreasonably beyond a certain period (60 days).[48][49] It may be noted that the cases triable by a Court of Session are not within the purview of this provision. However, such exclusion cannot probably be justified on sound policy considerations. If a mandatory bail provision contained in proviso *(a)* to Section 167(2) is considered expedient for making the investigating process more expeditious irrespective of the serious nature of the offence under investigation, a similar general provision regarding bail with a view to make the trial process more expeditious should have no objection, especially when the proviso to Section 437(6) enables the court to refuse bail for special reasons to be recorded in writing.

In *Prablad Singh Bhati* v, *NCT, Delhi*[49], it was ruled that merely because the accused was initially granted anticipatory bail for a lesser offence, that would not entitle him to be granted regular bail under Section 439 when later he is found to be involved in a graver offence.

Magistrates can grant bail only when there is no reasonable ground to believe that the accused is guilty of offence punishable with sentence of death or life imprisonment unless the accused is covered under Section 437(1). If the offence is exclusively triable by Sessions Judge the Magistrate should direct the accused to approach the Sessions Court.

{e) Release on bail after conclusion of the trial but before the judgment is delivered.—If, at any time after the conclusion of the trial of a person accused of a "non-bailable offence" and before judgment is delivered, the court is of the opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, *it shall* release the accused,

48. 41st Report, p. 516, para. 39.4; *see also* observations in

49. (2001) 4 SCC 280.

if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered. [S. 437(7)]

12.4 Discretion in granting bail in cases of non-bailable offences

Bail is a matter of right if the offence is bailable. But, except in the circumstances mentioned in the preceding para. 12.3, bail can only be a matter of discretion if the offence is non-bailable. It will be seen that the scope of the discretion depends upon various considerations: *i)* The scope of the discretion varies in inverse proportion to the gravity of the crime. As the gravity of the offence increases, the discretion to release the offender on bail gets narrowed down, *ii)* As between the police officers and the judicial officers, wider discretion to grant bail has been given to judicial officers. *Hi)* Amongst the judicial officers and courts, a High Court or a Court of Session has far wider discretion than that given to other courts and judicial officers.

While considering the scope of the discretion one important thing should always be kept in mind. Whether the discretion in granting bail is wide or narrow, it is not to be used in an arbitrary manner. "Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular."[50] The discretion to grant bail in cases of "non-bailable offences" has to be exercised according to certain rules and principles as laid down by the Code and judicial decisions. The following sub-paragraphs deal with the different aspects of the use of such discretion.

(a) *Discretion in granting bail, how to be exercised.*—When any person accused of or suspected of the commission of any "non-bailable offence" is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, other than the High Court or the Court of Session, he *may* be released on bail. [S. 437(1)] The word "may" in the above provision clearly indicates that the police officer or the court has got discretion in granting bail. However, there are certain principles which should guide the police officers and the courts in the exercise of this discretion. It should be noted at the outset that the object of detention pending criminal proceedings, is not punishment and that the law favours allowance of bail, which is the rule, and refusal is the exception.[51] While considering the question of bail in case of "non-bailable offences",

50- Mansfieidj quoted in ***Gudikanti***

51- ***Rao Harnamin Singh*** v. ***State,*** 1958 Cri Lj 563, ***566:*** AIR 1958 Punj 123; ***Sagri Bhagat*** v. ***State of Bihar,*** (1951} 52 Cri LJ

there cannot be very rigid and inflexible rules; however, the courts can for their guidance look to the following circumstances:

{/) the enormity of the charge;

(//} the nature of the accusation;

{in) the severity of the punishment which the conviction will entail;

{iv) the nature of the evidence in support of the accusation;

[v] the danger of the accused person's absconding if he is released on bail;

[vi) the danger of witnesses being tampered with:

{vii) the protracted nature of the trial;

(uiii) opportunity to the applicant for preparation of his defence and access to his counsel;

(ix) the health, age and sex of the accused;

(x) the nature and gravity of the circumstances in which the offence is committed;

(xi) the position and status of the accused with reference to the victim and the witnesses;

{xii) the probability of accused committing more offences if released on bail, etc.; and *{xiii)* interests of society.

There are also other considerations and the above is by no means an exhaustive catalogue of the factors which should weigh with the courts.[52] In *State* v. *Captain Jagjit Singh*[51], a three-judge Bench of the Supreme Court, while cancelling bail granted by the High Court in a prosecution for conspiracy and under Sections 3 and 5, Official Secrets Act, 1923, opined that the High Court should have taken into account various considerations such as nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the [52 53]

52. *Rao Harnarain Singh* v, *State,* 1958 Cri LJ 563, 566: AIR 1958 Punj 123; see also, *State* v. *Jagjit Singh,* (1962) T Cri LJ 2x5, 217: AIR 1962 SC 253; *Sagri Bhagat* v. *State of Bihar,* {1951} 52 Cri LJ 657: AIR 1951 Par 497, 499; *K.N. Joglekarv. Emperor,* (1932} 33 Cri LJ 94, *96:* AIR 1931 All 504; *Nagendra Nath Chakrabarthi* v. *King Emperor,* (1.925) 25 Cri LJ 732, 738: AIR 1924 Cal 476: ILR (1924} 51 Cal 402; *Gurcharan Singh* v. *State (Delhi Admn.),* {1978) 1 SCC xi8: 1978 SCC (Cri) 41, 51: 1978 Cri LJ 129, 136; *Gudikanti Narasimhulu* v. *Public Prosecutor,* (1978) 1 SCC 240: 1978 SCC (Cri) 115, 1x8-19: 1978 Cri LJ 502, 504-05; *A. Prasad* v. *State of Karnataka,* 1982 Cri LJ 542 (Kant); *Mazhar Ait* v. *State,* 1982 Cri LJ 1223 (J&K); *Bhagirathsinh* v. *State of Gujarat,* (1984) 1 SCC 284: 1984 SCC (Cri) 63: AIR 1984 SC 372; *Johny Wilson* v. *State of Rajasthan,* 1986 Cri LJ 1235 (Raj): *K.K. Jerath* v. *UT of Chandigarh,* 1998 4 SCC 80: 1998 SCC (Cri) 809; *Rajesh Ranjan* 53. AIR 19 62 SC 253.

larger interests of the public or the State, and similar other considerations which arise when a court is asked for bail in a non-bailabie offence. The previous convictions and the criminal record of the accused person, and also the likelihood of the repetition of the offences by the accused person if released on bail are also to be taken into account while deciding the question of bail.[54] While the protracted nature of trial, delay and the long detention of the accused were considered in favour of granting bail by some courts,[55] others refused to consider such situations in the factual context of cases.[56] It has also been said that collateral considerations such as the accused being poor etc. would not be considered/[7]

Granting bail to the accused person *merely* on the concession made by the Public Prosecutor would amount to non-exercise of the judicial discretion in granting bail and was, therefore, held to be improper and wrong.[58]

Simply because a co-accused has been granted bail an accused cannot be granted bail. Even at the stages of second or third bail application the court has to examine whether on facts the case of the applicant before the court is distinguishable from the other released co-accused and the role played by the applicant is such that it may disentitle him to bail.[59]

Courts used to grant bail on the basis of parity. The Allahabad High Court in 1999 recapitulated[60] the application of this principle thus:

> As regards the principle of parity in matter of rejection of bail application, it may be observed that law of parity is a desirable rule. In matter of release on bail to the co-accused may be applied where the case of the co-accused is identically similar, but cannot be applied for rejecting the bail application of co-accused. A co-accused cannot be denied bail, merely on the ground that the bail of another accused has been rejected by the Court earlier, the obvious reason being that while the earlier bail order denying bail to another co-accused was passed, the latter co-accused applying for bail was not heard.[61]

The Madhya Pradesh High Court, however, in *Ramesh Kateba* v. *State of* M.P.[62] cancelled a bail order granted on principle of parity as the accused suppressed the fact of rejection of application for bail once. But the same

54. *Sagri Bhagat* v. *State of Bihar,* (1951} 52.
55. *Cyan Pm hash* v. *State of Rajasthan,* 1991 Cn LJ 1176 (Raj);
Chinta Mani Trip at hi v. *State of U.P.,* 1991 Cri LJ 1162 (All); *Parveen Malhotra*
56. See, *Rajesh Ranjan Yadav* v. *CBI,* (2007) 1 SCC 70: (2007) r SCC (Cri) 254:
57. *jagdish Kumar* v. *State {Delhi Admn.),* 1990 Cri Lj 730 (Dei);
58. *Rama v. Dattatraya,,* 1981 Cri LJ 1605, 1612 (Bom); *also see*
59. *Nanha* v. *State of U.P.,* 1993 Cri LJ 938
60. *Yunts* v. *State ofU.P.,* 1999 Cri LJ 4094
61. *Ibid,* 4096.
62. 1999 Cri Lj 4243 (MP).

High Court in *Vishnu Maheshwari* v. *State of M.P* [63] [64] [65] sustained a similar bail order though the fact of rejection for bail by one co-accused was not mentioned in his application. The court reasoned that for suppression of fact the applicant was not responsible and that it was the duty of his counsel and prosecutor to have informed the court about the rejection of application for bail.

However, the Allahabad High Court has categorically ruled[63] [64] that no bail could be granted on the basis of parity of reasoning despite the Supreme Court's decision in *Izharul Haq Abdul Hamid Shaikh* v. *State of Gujarat*[65]. The court reasoned that it is nowhere held as a binding precedent that if bail has been granted by a Bench to any accused, then another Bench is bound to grant bail to other similarly placed accused.[66]

A specific negative direction is given by law while considering the exercise of the discretion in the matter of bail. The mere fact that the accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the court. [Third proviso to sub-s. (i) of S. 437]

An order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more details, materials, further developments and different considerations.[67] It has been held that a bail application after having been rejected by an Additional Sessions Judge, would be maintainable in the Sessions Court.[68] But it may not be appropriate if a person seeks and gets bail from a Sessions Court after having been denied bail by the High Court.[69]

Of late, an undesirable practice of Bench hunting has been noticed. What happens is that an applicant after having been refused bail goes before another Bench and gets bail even when the other Bench is available. This came to be deprecated by the Supreme Court. This is discussed in detail in para. 12.18.[70]

63. X999 Cri LJ 4403 (MP).

64. *Shahnawaz* v. *State ofU.P.,* 2009 Cri Lj 3839 (All); *Shyam Lai* v. *State ofU.P.,* 2009 Cri LJ 4486 (All).

65. (2009} 5 SCC 283: (2009) 2 SCC (Cri) 653: JT {2009) 3 SC 385.

66. *Shahnawaz* v. *State of U. P.,* 2009 Cri Lj 3839, 3S42 (AH).

67. *Babu Singh* v. *State of V. P.*, {1978) 1 SCC 379: 1978 SCC (Cri) 133: 1978 Cri LJ 651; see also, *Chhitar* v. *Stale*

68. *Rajesh Cboudbary* v. *State of Rajasthan,* 1987 Cri Lj 41.1. (Raj).

69. *Mahendra Singh* v. *State ofU.P.,* 1997 Cri Lj 4099 (AH).

70. *Shahzad Fsasan Khan* v. *Ishtiaq Hasa?i Khan,* (1987) 2 SCC 684: T987 SCC (Cri) 415: 1987 Cri Lj 1872; *State of Maharashtra* v, *Buddhikota Subha Rao {Capt.j,* 1989 Supp (2) SCC 605: 1990

Any officer or court releasing any person on bail in a case of "nonbailable offence" is required to record in writing his or its reasons for doing so. [S. 437(4)] This requirement would enable the High Court or the Court of Session to see whether the discretion in the matter of bail was properly exercised.[71] However, detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided while passing the orders on bail applications, because that might create the impression in the mind of the party that his case has been prejudiced.[72]

The word "appears" in Section 437(1) is wide enough to include voluntary appearance of the accused person. The actual physical presence and surrender of the accused with submission to the jurisdiction of the court is judicial custody, and the accused may be released from such custody on bail[73] and even when he is on bail notionally he is in the custody of the court.[74]

As will be seen in sub-para (d), the powers of the High Court and the Court of Session in the matter of granting bail are very wide; even so, according to the view expressed by the Supreme Court, where the offence is "non~bailable", various considerations such as those indicated above have to be taken into account before bail is granted in a "non-bailable offence".[75]

(b) ***No bail in case of offence punishable with death or imprisonment for life***.—In case of a person under arrest or detention as mentioned in sub-para. (***a***) above, if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life, he shall not be released on bail. [S. 437(x)(f)] However, the ***court*** may direct that any person under the age of ***16*** years or any woman or any sick or infirm person accused of such an offence be released on bail, [first proviso to S. 437(i)][76] The addition effected to Section 437(1)(£?)(//} stipulates that an accused who was earlier convicted of an offence punishable with imprisonment for three years or more but not less than seven years

71. See, ***State of Maharashtra*** v. ***Dhanendra Shnram Bhurle,*** (2009} 11 SCC 541: (2008) 3 SCC (Cri) 1480:
72. *State of Gujarat* v. *Hiralal Motilal Advani,* 1982 Cri LJ
73. ***State of Assam*** v. ***Mobarak All,*** 1982 Cri LJ 1816 (Gau); see also, ***Niranjan Singh*** v.
74. ***Thaniel Victor*** v. ***State of T.N.,***
75. ***State*** v. ***Jag;it Singh,*** {1962) 1 Cri Lj 215, 217: AIR 1962 SC 253; ***Sagri Bhagat*** v. ***State of Bihar,*** (1951) 52 Cri Lj 657: AIR 1951 Pat 497,
76. ***Shakn^ala*** Devi v. ***Srat5 off U.P.,***

shall not be released on bail. A proviso added to Section 437 provides for hearing the prosecution before the person is given bail if the offence accused is of a serious nature, *viz.* offences carrying death, life imprisonment or imprisonment for seven years' or more.

The conditions that the court may impose may include the following:

{a) that such person shall attend in accordance with the conditions of the bond executed;

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected; and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade him from disclosing such facts to the court or to any police officers or tamper with the evidence.

The court can also impose other conditions in the interests of justice.[77]

It has been held that the wnrd "may" in the first proviso to subsection (1} of Section 437 should not be read as mandatory. The discretion conferred on the judge by Section 437 is very wide and depending upon the circumstances of the case he can exercise it judiciously.[78]

Except in the cases of children, women and sick or infirm persons, the discretion to grant bail has been taken away by the above rule in cases of non-bailable offences punishable with death or life imprisonment. The basis for this rule is that the graver the offences in the charge, the chances of the accused making himself unavailable or scarce by the abscondence or by delaying collection of evidence or by threatening witnesses or scaring them away are more. A female or a person below *16* years of age or a sick or infirm person, because of their physical handicaps and/or immaturity, is not likely to interfere with the investigation or to delay the trial by abscondence or interference.[79] But the mere fact that the accused -was a woman would not entitle her for bail under the proviso to Section 437(1) CrPC. The nature and gravity of the offence and heinousness of such offence also have to be considered. If offence was of such nature which affects the vital interest of society and has adverse effect on the social and family life of the victims, bail could not be granted.[80]

The words "there appear reasonable grounds for believing" do not obviously mean a mere suspicion or conjecture. The w*ords mean such grounds as are based on reasons and logic and are not bereft of reasons. The grounds should be such as may lead one to believe that the accused

77. *See,* amendments affected by

/S. *Pramod Kumar Manglik* v. *Sadbna Rani,* 1989 Cri Lj 1772 (All).

79. *Nirmal Kumar Banerjee* v. *State,* 1972 Cri LJ 1582, 1583 (Cal).

80. *Meenu Dewan* v. *State,* 2.010 Cri Lj 2911 (Del). See also, *Shanti Kaur* v. *State of H.P.,* Criminal Misc. Petition (M) No. ITJI of

is guilty of such an offence. It is not only the probability of the ground being creative of a belief but even the possibility of such a belief which is sufficient to give rise to the interdiction referred to in the sub-section. Here, the degree of certainty of belief expected is far less than the degree of conviction which a court is required to possess while finding a man guilty of an offence.[81]

The phrase "an offence punishable with death or imprisonment for life" should be read disjunctively as if it meant "offence punishable with death, or punishable with imprisonment for life".[82] However, the Kerala High Court has taken the view that the prohibition against granting bail in Section 437 is confined to cases w'here the sentence is either death or alternatively imprisonment for life and that the prohibition does not extend to offences punishable with life imprisonment only,[83] The decision, though intended to liberalise the bail law, does not seem to be sound one.

It is not every sickness that entitles an accused person to the grant of bail under the first proviso to Section 437(1) mentioned above. The sickness contemplated by the proviso is a sickness which involves a risk or danger to the life of the accused person.[84]

Here, again the court releasing any person on bail under the first proviso to Section 437(1) will have to record in writing its reasons or special reasons for doing so. [S. 437(4)]

It may be noted that the power to grant bail under the proviso has been given to the court and not to any police officer.

(0bb) *Habitual offender or person previously convicted of serious offence not to be released on bail.*—If any person who had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or had been previously convicted on two or more occasions of a non-bailable and cognizable offence, is accused of, or suspected of the commission of, any non-bailable and cognizable offence, is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he shall not be released on bail. However, if such a person is under the age of 16 years or is a woman or is sick or infirm, or for any other special reason the court considers it just and proper to release him on bail, the court may direct that he be released on bail. [S. 437(i)(f/)] While so directing the release on bail, the court shall record reasons or special reasons for doing so. [S. 437(4)]

81. *State* v. *Harbans Lai,* 1975 Cri l.J 1705, 1706
82. *King Emperor* v. *Nga San Hiwaf* (192.7) 28 Cri Lj
83. *Satyan* v. *State,* 1981 Cri LJ 1313 (Ker).
84. *Fazal Namaz Jung* v. *State of Hyderabad,* 1952 Cri LJ 873,

(c) *Grant of bail with conditions*.—Cases often arise under Section 437, where, though the court regards the case as fit for the grant of bail, it regards the imposition of certain conditions as necessary in the circumstances. [A] To meet this need sub-section ('3) of Section 437 provides as follows:

When bail may be taken in case of non-bailable offence

> 437* (3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of i860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section {1}, [85 86 87][the Court shall impose the conditions,—
>
> *{a)* that such person shall attend in accordance with the conditions of the bond executed under this Chapter,
>
> (.b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the comi dssion of which he is suspected, and
>
> (c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,
>
> and may also impose, in the interests ofjustice, such other conditions as it considers necessary.]

It will be noticed that

(1) the power to impose conditions has been given to the *court* and not to any police officer;

(2) the power to impose conditions can only be exercised

(i) where the offence is punishable with imprisonment which may extend to seven years or more; or *(ii)* where the offence is one under Chapter VI (offences against the State}, Chapter XVI (offences against the human body), or Chapter XVII (offences against property) of the IPC; or *(Hi)* where the offence is one of the abetment of, or conspiracy to, or attempt to commit any such offence as mentioned above in *(i)* and *(it)*.

It will be seen that the conditions to be imposed must be such as are linked up with the preventing of the escape of the accused or preventing repetition of the offence or otherwise required in the interests of justice. However, a condition tantamount to refusing the bail will not be consid- [85 86 87]

85. 41st Report, p. 316, para. 39.5.
86. ***Subs,*** by Act 25 of 2005, S. *3~{ii)* (w.e.f. 23-6-2006}.
87. ***Kamla Pandey*** v. R.. (1949} 50 Cri LJ 1009: AIR 1949 Cal 582; ***see*** observations in ***Mobd. Tariq*** v. ***Union of India,*** 1990 Cri LJ 474 (All); A[r]. ***Sasikala*** v. ***Directorate of Enforcement,*** 1997

in derogation of any fundamental right of the accused guaranteed under the Constitution. A condition that the accused is to aid the police by accompanying them to various places for the recovery of stolen goods would be in clear derogation of the right of the accused of not being a witness against himself, and as such would be invalid.[88] The order of the Sessions Court granting bail on condition that the accused should pay an amount per month till the disposal of the case was held improper.[89] Another order granting bail on the accused's executing a bond for a sum of [A] 50,000 with two sureties and one of the sureties giving cheques for [A] 2 lakhs was held unreasonable by the Supreme Court. In fact, one of the cheques got dishonoured and the accused was constrained to languish in jail for 10 months on account of this. The Supreme Court granted him bail on a bond of A 25,000 with two solvent sureties.[90] Seizure of passport and order to return dowry articles as condition for grant of anticipatory bail was not approved by the court.[91]

In 2009, Section 437-A came to be added to the Code by Act 5 of 2009. It is to help ensure the presence of the accused before the appellate court. Section 437-A enacts thus:

> 437-A. (1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence of the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition hied against the judgment of the respective Court and such bail bonds
>
> shall be in force for six months.
>
> (2) If such accused fails to appear, the bond stand forfeited and the procedure under Section 446 shall apply.[92]

Bail to require accused to appear before next appellate Court

(d) *Powers of High Court or Court of Session in the matter of granting bail*.—Section 439(1) gives very wide discretion to the High Court and the Court of Session in the matter of granting bail. Section 439 reads as follows:

> 439. (1) A High Court or Court of Session may direct—
>
> *(a)* that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;
>
> (Eb) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:
>
> Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the [8]

Special powers of High Court or Court of Session regarding bail

S8. *Sk. Layak* v. *State,* 19Si Cri Lj 954 (AP).
89. *Mukeshbhai Nanubhai Pate! v. State of Gujarat,* 1998 Cri Lj 194 {Guj}.
90. *San deep Jam* v. *NCT of Delhi,* {2.000} 2 SCC 66: 2000 SCC (Cri) 316.
91. *Mohinder Kaurw State of Punjab,* {2008} 4 SCC 580: (2008} 2 SCC (Cri) 462: 2008 Cri LJ 2623.
92. *Iris,* by Acr 5 of 2009 {w.e.f. 31-12-2009).

Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

A person can move the High Court or the Court of Session for bail under Section 439 only when he is in custody; and a person is said to be in custody within the meaning of this section when he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence.[93]

The discretion to grant bail given to the High Court and the Court of Session under Section 439 is not fettered in terms by the restrictions contained in Section 437, but, on principle, these restrictions should equally govern the exercise of the discretion by them under Section 439[94 95] inasmuch as Section 439 is in a way an expansion of Section 437.[91] The overriding considerations in granting bail which are common both in the case of Section 437(1) and Section 439(1) are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice, of repeating the offence, of jeopardising his own life being faced with a grim prospect of possible conviction in the case, of tampering with witnesses; the history of the case as well as its investigation and other relevant grounds, which in view of so many valuable factors, cannot be exhaustively set out.[96 97] Though the discretion given by Section 439 is in a sense unfettered and is wide enough to allow bail in case of a non-bailable offence of the worst type, it has to be exercised judicially according to well-established principles.[9/] Where a [93 94 95 96 97]

93. *Niranjan Singh* v. *Prahhakar Rajaram Kharote,* (1980) 2 SCC 559: 1980 SCC (Cri) 508. 511: 1980 Cri Lj ₄Z6; ***see*** discussions in ***Man Singh*** v. ***Ganga Singh,*** 1991 Cri Lj 12S (Raj); But see also, ***Chinta Mani Tripathi*** v. ***State of*** U.P., 1991 Cri Lj ***n6z*** {All}.
94. *Ahmad Sheikh* v. *State,* 1975 Cri LJ 81 (j&K); *Swapan Banerjee* v. ***State,*** 1972 Cri Lj 71 (Cal).
95. ***Pa wan Kumar Pandey*** v. ***State of*** LLP., 1997 Cri LJ 2686, 2687 (All); *Kalyati Chandra Sarkar* v. *Rajesh Ranjan,* (2004) 7 SCC
96. *Gurcharan Singh* v. *Stat7 (Delhi Admn.),* (1978) 1 SCC 11S: 1978 SCC (Cri) 41, 51: 1978 Cri Lj 129; ***Ash Mohammad*** v. ***Shiv Raj Singh,*** (2012} 9 SCC 446; {2012} 3 SCC (Cri) 1172: 20X2 Cri Lj 4670. See also, Y.S. ***Jagan Mohan Reddy*** v. ***CBI,*** (2013/ 7 SCC 439: (2013) 3 SCC (Cri? 552: 2013 Cri Lj
97. ***Ashraf Ali*** v. ***Emperor,*** {1915) 1(5 Cri Lj 215. 216: ILR (1915) 42 Cal 25; ***State*** v. ***Shaniilal,***

judge ordered release on bail of the respective appellants on furnishing a bond but the effective release had been ordered on a future date ranging between 6 months to i year, the Supreme Court held it pre-emptive of the duties of the court.[1] The powers of the High Court in the matter of granting ball are very wide; even so where the offence is non-bailable, various considerations have to be taken into account before bail is granted in a non-bailable offence.[2]

Exercise of power to grant bail to prisoners by the High Court judges while on inspection of jail came to be disapproved by the Supreme Court in *Jasbir Singh* v. *State of Punjab*[1]; the court rightly ruled that such practice may adversely affect the independence of lower judiciary.

Although the High Court has concurrent jurisdiction with the Sessions Court to grant bail under Section 439, it is considered desirable that the lower court should first be moved in the matter. This is especially important because any expression of opinion by the superior court is likely to prejudice the trial in the lower court. Therefore, only in exceptional or special circumstances an application for bail may be directly made to the High Court.[4]

As the courts granting bail have powers to set forth any condition which they consider necessary in the interest of justice, as provided under Section 437(3), the higher courts exercising powers under Section 439 should have the power to examine the correctness of that order in all its aspects and to modify or set aside any portion of the same if it is considered necessary/

With a view to make it more difficult for persons accused of grave offences to get released on bail by an ex parte order, and be in a position to hamper investigation, provision has been made that in every case where the offence is punishable with imprisonment for life, or is triable exclusively by a Court of Session, no court shall grant bail except after giving notice in writing of the application to the Public Prosecutor; if this is not done, reasons for not giving such notice are to be recorded in writing.[6]

(e) *Approver in custody not to be released on bail.*—According to Section *306(4)$},* every person accepting a tender of pardon under

1955 Cri Lj 12.05, 1208: AIR 1955 Raj 141; *Gmcharan Singh v. State {Delhi Admn.),* (1978) 1 SCC 118: 1978 SCC (Cri) 41: 1978 Cri Lj 129; *Sangappa* v. *State of Karnataka,* 1978 Cri LJ 1567 (Kant).

1. *Dashamth Pandey* v. *State of Bihar,* 1995 Supp (3) SCC 551: 1995 SCC (Cri) 991.
2. *State* v. *Jag jit Singh,* (1962) 1 Cri Lj 215: AIR 19S2 SC 253.
3. (2006) 8 SCC 294: {2006} 3 SCC (Cri) 470.
4. *Hajialisher v. State of Rajasthan,* 1976 Cri LJ 1658 (Raj); see also, *Chajju Ram Godara* v. *State of Haryana,* 1978 Cri LJ 608 (P&H) (a decision under S. 438}; *Dainy* v. *State of M.P.,* 1989 JLJ 232 referred in *Manisha Nema* v. *State of M.P.,* {2003) 2 MPLJ 587.
5. *Rajanikanta Mehta* v. *State,* 1975 Cri Lj 850, 851 (Ori).
6. Note on ds. 445-59; *Premchand Bansi Jadhav* v. *State of Maharashtra,* (2012) 5 AIR Bom R 881: 2012 Bom CR (Cri) 376; *Masood Ali Khan* v. *State of U.P.,* 2009 Cri LJ 1322 (All),

Section 306(1) shall, unless he is already on bail, be detained in custody until the termination of the trial. The approver by accepting the conditional pardon does not cease to be an accused person until he fulfils his undertaking of full and true disclosure and secures his discharge; and therefore, he, like the other accused persons, is to be detained in custody.

The effect of this provision is to take away the discretion to grant bail by providing that the approver shall be detained in custody till the termination of the trial. The object is to protect him from the wrath of his associates whom he seeks to expose, to prevent him from the temptation of saving his companions, and to ensure his presence in court till the completion of the trial. However, the High Court, in the exercise of the inherent powers under Section 482, may release the approver on bail in exceptional circumstances to prevent the abuse of the process of the court/

This provision has, however, come to be re-examined in a different perspective. The Delhi High Court while appreciating the idea underlying Section *306(4)$}* expressed its disapproval saying that but for the availability of inherent powers with the High Court to release the approver at his risk, the vires of Section *306(4)$)* might be open to serious challenge.[7] [8]To the same effect was the decision of Rajasthan High Court.[9]

Cancellation of bail

According to Section 437(5), any court which has released a person on bail under sub-section (1) or sub-section (2) of Section 437 *[i.e.* in cases covered by para. 12.4(a), (ε?), (bb), and para. 12.3(c)] may, if it considers it necessary to do so, directs that such person be arrested and committed to custody.

The power to cancel bail has been given to the court and not to a police officer. Secondly, the court which granted the bail can alone cancel it.[10] The bail granted by a police officer cannot be cancelled by the Court of a Magistrate. For cancellation of the bail in such a situation, the powers of the High Court or Court of Session under Section 439 will have to be invoked.

Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review' of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to

12.5

7. *A.L. Mahra* v. *State,* 1958 Cri IJ 41.3: AIR 1958 Punj 72; *Bangaru Laxman* v. *State,* ILR (2012] 2 Del 102. See also, *Smithlal* v.
8. *frem Chand* v. State, 1985 Cri IJ 15 34 (Del).
9. *Noor Taki* v. *State of Rajasthan,* 1986 Cri Lj 1488 (Raj).
10. See, *Narendra K. Amin* v. *State of Gujarat,* {2008) 13 SCC 584: (2009) 3 SCO (Cri.) 813.

allow the accused to retain his freedom during the trial.[11] However, bail granted illegally or improperly by a wrong and arbitrary exercise of judicial discretion can be cancelled even if there is absence of supervening circumstances.[11] Such a case can be appealed against rather than seeking cancellation.[13] If there is no material to prove that the accused abused his freedom the court may not cancel the bail.[14]

It has also been held that an order of bail granted by a Magistrate can be challenged under the revisional jurisdiction of the High Court. As regards the difference between an application for cancellation of bail and revisional application the court pointed out that while in the former case the basic postulate is that the order was valid when it was passed, but that on account of supervening circumstances it needed to be varied or modified or cancelled, in the latter case of revision application the grievance is that the order was bad from its inception.[15]

This view came to be dissented from by the Allahabad High Court which hold the view that an order granting bail being an interlocutory order cannot be challenged under the revisional jurisdiction of the Sessions Court or High Court.[16] [17] [18] It has relied upon the Supreme Court decisions in *Amur Nath* v. *State of Haryana*[171], *Madhu bimaye* v. *State of Maharashtra*[1] and its own Division Bench decision in *Bhola* v. *State of U.P.*[19]

The Bombay High Court has also relied upon these Supreme Court decisions to arrive at the contrary conclusion referred to above.[20] Having

11. *State (Delhi Admn.)* v. *Sanjay Gandhi,* (1978) 2 SCC 411: 1978 SCC (Cri) 223, 2.30-31: 1978 Cri Lj 952; see also, *Khagendra Nath Bayan* v. *State of Assam,* 19S2 Cri LJ 2109 (Gau); *see also,* observations in *R. Shakuntala v.*
12. *Baiktmthanat6 Dalai* v. Buifa, 1991 Cri LJ 203 (Ori); *State; of Maharashtra* v. *Anand Chintaman Dighe,* (1991) 3 SCC 209: 1991 SCC (Cri) 500: 1991 Cri LJ 1945; *Mahendra Singh* v. *State of* U.P., 1997
13. *Ash Mohammad* v. *Shiv Raj Singh,* (2012) 9 SCC 446: (2012) 3 SCC
14. *Parakshita Pradhan* v. *Bairagi Pradhan,* 1991
15. R. *Shakuntala* v. *Roshanlal Agarwal,* 1985 Cri Lj 68 (Bom). See also, *Subodh Kumar Yadav* v. *State of Bihar,* {2009) 14 SCC 638: (2010) 2 SCC (Cri) 200; *Man;it Prakash* v. *Shobha Devi,* {2009} 13 SCC 7S5: {2010) r SCC (Cri) 1260: 200S
16. *State of U.P.* v. *Karam Singh,* 1988 Cri Lj 1434
17. *Amur Nath* v. *State of Haryana,* (1977) 4 SCC 137: 1977 SCC (Cri) 5S5: 1977 Cri
18. {1977) 4 SCC 551: 1978 SCC (Cri) 10: 1978 Cri LJ 165.
19. 1979 Cri Lj 718 (AEl).
20. R. *Shakuntala* v. *Roshanlal Agarwal,* 19S5 Cri LJ 68 (Bom); see also,

regard to the purpose behind the enactment of Section 397, the Bombay High Court decision appears to be persuasive*

The issue of cancellation of bail can arise only in a criminal case, but as it is only an incidental matter, it is not required to be proved beyond reasonable doubt.[21]

The court has been given power and discretion to cancel the bail, but the section does not give any guidance as to when and how the discretion is to be exercised. In *Public Prosecutor* v. *George Williams*[22], the Madras High Court pointed out five cases where a person granted bail may have the bail cancelled and be recommitted to jail: *i)* where the person on bail, during the period of the bail, commits the very same offence for which he is being tried or has been convicted, and thereby proves his utter unfitness to be on bail; *u)* if he hampers the investigation as will be the case if he, when on bail, forcibly prevents the search of places under his control for the *corpus delicti* or other incriminating things; *in)* if he tampers with the evidence as by intimidating the prosecution witnesses, interfering with the scene of the offence in order to remove traces or proofs of crime, etc.; *iv)* if he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and *v)* If he commits acts of violence, in revenge, against the police and the prosecution witnesses and those who have booked him or are trying to book him.

The fact that before an order (releasing the accused on bail) was passed under Section 167(2} the bail petitions of the accused were dismissed on merits, is not relevant for the purpose of taking action (cancellation of bail) under Section 437(5). Nor is it a valid ground that subsequent to release of the accused persons under Section 167(2) a challan was filed by the police.[23]

According to Section 439(2) a High Court or a Court of Session may direct that any person who has been released on bail under Chapter XXXIII of the Code (which gives provisions as to bail and bonds) be arrested and committed to custody. The powers of cancellation given to these higher courts are quite wide. Whether the offence was bailable or non-bailable is immaterial,[24] also whether the bail was granted by a police officer or a court is not material. However, the power is to be used judicially having regard to all the facts and circumstances of the case.[25]

21. *State* v. *Sanjay Gandhi.* (1978) 2 SCC 411: 1978 SCC (Cri) 223, 231: 1978 Cri LJ 952.
22. 1952 Cri L] 213, 214: AIR 1951 Mad 1042; see also, *Bachehu Lai* v. *State,* {1951} 52 Cri LJ 505 (All).
23. *Bashir* v. *State of Haryana,* (1977) 4 SCC 410: 1977 SCC (Cri) 608, 612: 1978 Cri LJ 173, 176. See also, *Aslam Babalal Desai* v. *State of Maharashtra,* (1992) 4 SCC 272: 1992 SCC (Cri) 870.
24. *Madhab Chandra Jena* v. *State of Orissa,* 1988 Cri LJ 608 (Ori).
25. *See* observations in *Imamuddhi* v. *Ayub Khan,* 1984 Cri LJ 117 (Raj); *Madhab Chandra Je?ya* v. *State of Orissa,* 1988 Cri LJ 608 (Ori); *Kashmeri Devi* v. *Delhi Admn.,*

Under Section 439(2), a High Court may commit a person released on bail under Chapter XXXIII of the Code by any court including the Court of Session to custody, if it thinks appropriate to do so. However, a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. Nor has the Sessions Court the power to pass an interim order of cancellation of bail.[26] If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of bail.[27]

There is no absolute bar against an informant to move for cancellation of bail under Section 439(2). "Yet the considerations which weigh with the court to exercise powers at the instance of a private person are, besides the factors necessary to be considered when the application is made by the State, the additional factors of whether the order granting bail has resulted in gross miscarriage of justice, is wholly an abuse of the process of law and whether there is any real threat or risk to the informant or his party due to the accused being at large."[28]

The Supreme Court has categorically ruled that the High Court's power under Section 439(2) could be exercised not only at the instance of the State or the Public Prosecutor.[29] The court's observations are self- explanatory. It said:

> It is not disputed before us that the power so vested In the High Court can be invoked either by the State or by any aggrieved party. Nor is it disputed that the said power can be exercised suo motu by the High Court.[30]

12.6 Anticipatory bail

(a) Object.—Section 438 makes a provision enabling the superior courts to grant anticipatory bail. *i.e.* a direction to release a person on bail issued

26. *Yunus Hussain Rathod* v. *Collector of*
27. *Gurcharan Singh v. State (Delhi Admn.),* (1978) r SCC 11S: 1978 SCC (Cri)
28. *Prafulla Kumar Pradban* v. *Pabanesiuar Subudbi,* 1989 Cri Lj
29. R. *Rathinam* v. *State,* (2000) 2 SCC 391: 2000 SCC (Cri) 958.

even before the person is arrested. The Law Commission considered the need for such a provision and observed;

> The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.[31]

In its subsequent report the Law Commission expressed the view that the power to grant anticipatory bail should be exercised in very exceptional case. The Commission further observed:

Direction for grant of bail to person apprehending arrest

> In order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.[32]

Section 438 reads as follows:

> 438.[33] [(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:—
>
> (/) the nature and gravity of the accusation;

31. 41st Report, p. 321, para. 39.9.
32. 48th Report, p. 10, para. 31.
33. *Subs,* by Act 25 of 2.005, S. 38.

with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(i-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor the Court considers such presence necessary in the interest of justice.]

(a) When the High Court or the Court of Session makes a direction under sub-section (i), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

[/) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(«) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(Hi) a condition that the person shall not leave India without the previous permission of the court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

Under the revised section the prosecution gets maximum opportunity for presenting its case before the grant of anticipatory bail. The factors that go into the decision of the court have been spelt out dearly in the section.

(b) Meaning.—The words "anticipatory bail" are not found in Section 438 or in its marginal note. In fact "anticipatory bail" is a misnomer as it is not bail presently granted in anticipation of arrest. When the court grants "anticipatory bail", what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested, and, therefore, it is only on arrest that the order granting "anticipatory bail" becomes operative.[34] The section, however, makes no distinction whether the arrest is apprehended at the hands of the police or at the instance of the Magistrate. The issuance of warrant by the Magistrate against a person justifiably gives rise to such an apprehension and well entitles a

34. *Balchand jam* v. *State of M.P.*, (1976) 4 SCC 572: 1976 SCC

person to make a prayer for "anticipatory bail".[35] Issuance of a summon for appearance also entitles an accused to apply for "anticipatory bail".[36 37 38]

It has also been held that "anticipatory bail" cannot be granted to a person to do something which is likely to be interpreted as commission of a crime even if the offender intended it as something in exercise of his rights.[3/] The expression "anticipatory bail" is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest.[35 38] The distinction between an ordinary order of bail and an order of "anticipatory bail" is that whereas the former is granted after arrest and, therefore, means release from the custody of the police, the latter is granted in anticipation of arrest and is, therefore, effective at the very moment of arrest.[39]

(c) Concurrent jurisdiction of High Court and Sessions Court.— According to Section 438(1) an application for "anticipatory bail" can be made to the High Court or Court of Session; however, normally it is to be presumed that the Court of Session would be first approached for the grant of "anticipatory bail" unless an adequate case is made out for straightaway approaching the High Court directly without first coming before the Court of Session.[40] The Full Bench of the Allahabad High Court has, however, taken the view that a bail application under Section 438 may be moved in the High Court without the applicant taking recourse to the Court of Session.[41] If the application filed in the Court of Session for "anticipatory bail" is rejected, the applicant can again approach the High Court under Section 438(1) as there is no bar to do so.[42] As bails are against arrest and detention, an appropriate court within whose jurisdiction the arrest takes place or is apprehended or is contemplated will also have jurisdiction to grant bail to the person concerned. Therefore, the High Court or the Court of Session having jurisdiction over the place where the arrest is apprehended by the applicant has jurisdiction to entertain application for "anticipatory bail", even though the first information report (FIR) might have been registered at a place within the jurisdiction

35. *Puran Singh* v. *Ajit Singh,* 1985 Cri Lj 897 (P&H); *Sk. Kasim* v. *State,* 1986 Cri Lj 1303 {AP); *Akhalaq Ahmed F. Patel* v. *State of*
36. *P.V. Narasimha Rao* v. *State,* 19[7]7 CriLJ 961 (Dei).
37. *Thayyanbadi Meethal Kunhiraman* v. *S.L of Police,* 1985 Cri LJ mi
38. *Padma Charan Panda* v. S. *Ram Mohan Rao,* 1987 Cri LJ 92.3 (Ori).
39. *Gurbaksb Singh Sibbia* v. *State of Punjab,* {1980) 2 SCC 565: 1980 SCC (Cri) 465, 474-75: 1980 Cri Lj 1125.
40. *Chkajju Ram v. State of Haryana,* 1978 Cri LJ 608 (P&H); *Hajialisher* v. *State of Rajasthan,* 1976 Cri Lj 1658 (Raj).
41. *Onkar Nath Agarwal* v. *State,* 1976 Cri Lj 1142, 1145 (Ail) (FB); Y. *Chendrasekhara*
42. *Jagannath* v. *State of Maharashtra,* 1981 Cri LJ r808 (Bom); but set: contra, *Amiya Kumar Sen* v. *State of W.B.,* 1:979 Cri Lj 288 (Cal); see also, *Devidas*

of another High Court or Court of Session.[43] The opinions expressed by the Supreme Court in some cases seem to favour the view that the question of granting "anticipatory bail" to any person who is allegedly concerned with the offence must for all practical purposes be considered by the courts within whose territorial jurisdiction such offences could have been perpetrated.[44]

(d) Reasonable apprehension of arrest for a non~bailable offence.— Section 43SU) confers on the High Court and the Court of Session the power to grant "anticipatory bail" if the applicant has reason to believe that he may be arrested on the accusation of having committed "a non- bailable offence".

If the offence is non-bailable, it is immaterial for the purpose of Section 438 whether the offence is cognizable or non-cognizabie,[45] or whether it is one under the IPC or under any other law like the Customs Act, 196a.[46] "Anticipatory bail" was granted by the Karnataka High Court to the accused who was apprehending arrest by forest officials.[47] There is no restriction on granting "anticipatory bail" merely because the alleged offence is one punishable with death or imprisonment for life.[48]

Section 438 does not require that the offence in respect of which the "anticipatory bail" is asked for has been registered with the police. The filing of FIR is not a condition precedent to the exercise of the power under Section 43s.[49] The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.[50]

The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere "fear" is not "belief" for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that someone

43. *Pritam Singh* v. *State of Punjab,* 1980 Cri LJ .1174 (Del); *B.R. Sinha* v. *State.,* 1982 Cri Lj 61, 63 (Cal); see also, *Syed Zafntl Hassan* v. *State,* 1986 Cri LJ 605 (Pat); *Pradeep Kumar Soni* v. *State ofM.P.,* 1990 Cri LJ
44. *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra,* (1996) 1 SCC 667: 1996 SCC (Cri) 198: 1996 Cri LJ 1568; *State of Assam* v. *Brojen Gogol,*
45. *Suresk Vasudeva* v. *State,* 1978 Cri
46. *E. Joseph* v. *Collector of Customs,* 1982 Cri LJ 559 (Mad);
47. *Shankar Nayak* v. *State of Karnataka,* 1991 Cri LJ 1468 (Kant); but
48. *Gurbaksk Singh Sibbia* v. *State of Punjab,* {1980} 2 SCC 565: 1980 SCC
49. *Suresh Vasudeva* v. *State,* 1978 Cri
50. *Gurbaksb Singh Sibbia* v. *State of Punjab,* (1980) 2 SCC 565: 1980 SCC

is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a "non-bailable offence" must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested.[M] But in this determination the complainant does not have the right to argue against the grant of "anticipatory bail" as in all probability- such a complainant would be swayed with emotions to seek revenge.[51 52] However, the court's decision has to be a balanced one.[51 52 53 54 55]

If the apprehension of a person as mentioned above continues even at the stage of committal court proceedings, there is nothing in Section 43 S to debar such person from applying for "anticipatory bail" in case of his apprehended commitment under custody. On such an application the High Court or the Court of Session may pass an order under Section 438 directing the committing Magistrate not to commit the person in custody to the Court of Session.[54 55]

{<e} Wide discretion in granting anticipatory bail.—The words "may, if it thinks fit" used in Section 438(1) and the absence of any specific restraints on the exercise of the power to grant "anticipatory bail" clearly indicate that the legislature intended to confer and has in fact conferred very wide discretion on the High Court and the Court of Session to grant "anticipatory bail". These courts in the exercise of their judicial discretion can grant "anticipatory bail" if they consider it fit to do so on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, these courts are free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.-'°

In this connection the Supreme Court has observed:

> In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made.

51. *Ibid*, 489.
52. *Jndu Bala* v. *Delhi Admn.*, 1991 Cri LJ 1774 (Del).
53. *Mohd. Mazafar Hossain v. State of Orissa*, 1990 Cri LJ 1024 (Ori); also see. *Sagan Kumar* v. *State*, 1991 Cri Lj 645 (Del); V.
54. *Ramsewa*s v. *State of* M.P., 197 9 Cri LJ 1485 (M P); but see contra, *Rewat Dan* v. *State of Rajasthan*, 1975 Cri Lj 691 (Raj); also see, *Padma Charan Panda* v. S. *Ram Mohan Rao*, 1987 Cri
55. *Gurhaksh Singh Sihbia* v. *State of Punjab*, (1980) 2 SCC 565: 1980 SCC (Cri) 465, 480: 1980 Cri LJ 1125.

> But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by *mala fides;* and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and 'the larger interests of the public or the State' are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.[56]

Though the applicant in order to succeed must make out a case for the grant of anticipatory bail under Section 43 8, that section does not require him to make out a "special case".[57] The discretion in granting "anticipatory bail" is undoubtedly to be exercised with care and circumspection, but then it will not be correct to say that the power to grant anticipatory bail must be exercised in exceptional cases only.[58]

In *Balchand Jain* v. *State* o/~M.P.[59], a three-judge Bench, considering the question whether an order of "anticipatory bail" can be competently made by a Court of Session or a High Court under Section 438 in case of offences falling under Rule 184 of the Defence and Internal Security of India Rules, 1971 made under the Defence and Internal Security of India Act, 1971, explained the object sought to be achieved by Section 438 and held that Section 438 of the Code is an extraordinary remedy and should be resorted to only in special cases. It would be desirable if the court before passing an order under Section 438 of the Code issues notice to the prosecution to get a clear picture of the entire situation, and that in cases covered by Rule 184 of the Rules the court exercising power under Section 436 or Section 438 of the Code has got to comply with the conditions mentioned in clauses *(a)* and *(b)* of Rule 184; and only after the court has complied with those conditions that an order under any of these section of the Code in respect of such offences could be passed. It is also manifest

56. *Ibid.*
57. *Ibid,* 484 [SCC (Cri)]. See also. *State of Maharashtra* v. *Mohd. Sajid Husain Mohd.* 5. *Husain,* (z008) 1
58. *Gurbaksh Singh Sibbia* v. *State of Punjab,* {1980} z SCC 565: 1980 SCC (Cri) 465, 474-75: 1980 Cri LJ XlZ5; see also, *Pokar Ram* v. *State of Rajasthan,* {1985) z SCC 597: 1985 SCC (Cri) Z97; *Samunder Singh* v. *State of*
59. (1976) 4 SCC 57Z .

that the conditions imposed by Section 437(1) are implicitly contained in Section 438.

"Anticipatory bail" may not necessarily be refused merely on the ground that a legitimate case for remand of the offender to the police custody under Section 167(2,) is made out by the investigating agency.[60] Persons accused of economic offences and atrocious crimes are not given anticipatory bail by the courts.[61 62] It has, however, been held by the Madras High Court that a third party could be allowed to be heard against grant of anticipatory bail to 62

a person.

The view taken by some High Courts that the limitations imposed in Section 437 on granting of bail are implicit in Section 438 and must be read into it, has been rejected by the Supreme Court and is no longer good law* for the purpose of canalising the discretion in granting anticipatory bail.[63]

If an application for "anticipatory bail" is made to the High Court or the Court of Session, it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate under Section 437, as and when an occasion arises.[64 65]

The court while granting anticipatory bail should record reasons for doing

so. 65

(f) *Anticipatory bail with conditions*.—The High Court or the Court of Session, while granting anticipatory bail may impose conditions as mentioned in Section 438(2). The conditions mentioned in that sub-section are only illustrative and the court may impose other conditions,[66] if it thinks fit, with a view to strike a balance between the individual's right to personal freedom and the investigational rights of the police. For instance, the court may direct that the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27, Evidence Act, or that he should be deemed to have surrendered himself

60. *Gurbaksh Singh Sibbia* v. *State of Punjab,* (1980} 2 SCC 565: 1980 SCC (Cri) 465,
61. *Ameer Deen Habib* v. *Enforcement Directorate,* 1997 Cri Lj 4581 (Bom);
62. *P.S. Saravanabhavanandam.* v. S. *Murugaiyyan,* 1986 Cri LJ 1540 (Mad).
63. *Gurbaksh Si?igh Sibbia* v. *State of Punjab,* (1980) 2 SCC 565; T9 80 SCC (Cri) 465, 474-75: 1980 Cri Lj 1125; see also, *Baldevbbai*
64. *Ghrbaksh Singh Sibbia* v. *State ofPunjab,* (19 80) 2 SCC 565:1980 SCC (Cri) 465, 489-90: 1980
65. *State of Maharashtra* v. *Vishwas Shripati Patil,* 1978 Cri LJ 1403 (Bom). See also, *State of Maharashtra* v. *Dbanetidra Shriram Bhurle,* {2009) 11 SCC 541: (2008) 3 SCC (Cri) 1480: 2009 Cri LJ 1546; *Suresh Kumar*
66. *Suresh Vasudeua* v. *State,* 1978 C ri LJ 677 (De l).

if such a discovery is to be made. But seizure of passport and return of dowry articles, etc. in a case came to be disapproved.[67] In certain cases the courts resorted to preventing arrest till the accused's request for anticipatory bail was considered. This practice is not appreciated.[68] While granting anticipatory bail the court may direct that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of the matters covered by the order. The applicant in such cases may be directed to obtain an order of bail under Section 437 or Section 439 within a reasonably short period after the filing of the FIR as aforesaid.[69]

Fiowever, the court granting "anticipatory bail" cannot direct that the direction to be released on bail shall be operative only after some specified days after the arrest. Because the effect of such an order would be to disable the applicant from applying for regular bail under Section 437 immediately after his arrest, before the period mentioned in the order is over. Section 438 does not entitle the court to override the provisions of Section 437 and to stay for a certain period of time the right of the applicant to apply for and to obtain his release on bail.[70]

(g) No *"blanket order" of anticipatory bail*.—If a direction is issued under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever", such a direction would amount to a "blanket order" of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which no concrete information can possibly be had. Such a "blanket order" of anticipatory bail is not contemplated by Section 438 as that section requires that the applicant must have reasonable grounds to believe that he might be arrested for having committed a non-bailable offence. Moreover, such a "blanket order" would cause serious interference with both the right and duty of the police in the matter of investigation. Such an order would become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the Supreme Court has held that a "blanket order" of anticipatory bail should not generally be passed and

67. See, *Mohinder Kaur* v. *State ofPunjab,* (200S) 4 SCC 580: (2,008) 2 SCC (Cri) 462: 2008 Cri LJ 2625

68. *Phulla Dass* v. *State of Punjab,* 1998 Cri LJ 157 (P&H); *Dukhishyam Benupani* v. *Arttn Kumar Bajoria,*

69. *Gurbaksb Singh Sibbia* v. *State of Punjab,* (1980) 2 SCC 565: 1980 SCC (Cri) 465, 491: 1980 Cri LJ 1125. *But see* observations of the Supreme court in *Siddharam*

70. G.V. *Prabhit* v. *State,* 1975 Cri LJ 1339, 1340

that the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective/[1]

(/?} *Interim order and notice to Public Prosecutor.*—Section 438 does not require that a notice be given to the Public Prosecutor before the application for anticipatory bail is considered by the court and legally it is possible to pass an ex parte order of anticipatory bail. But *ordinarily* an order of anticipatory bail should not be passed without issuing notice to the prosecution and giving it an opportunity to oppose the application for anticipatory bail/[2] But in case there are circumstances justifying the making of an ex parte interim order and such an order is passed, a short dated notice should be issued to the prosecution and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions be imposed on the applicant even at that stage."[3]

(2) *No anticipatory bail after arrest.*—Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves contradiction in terms, insofar as the offence or offences for which he is arrested are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 if he wants to be released on bail in respect of the offence or offences for which he is arrested.[71 72 73 74]

(/"} *Bail to be effective till the conclusion of the trial.*—There is nothing in Section 438 to suggest that the order of anticipatory bail shall be effective up to a particular stage or till the filing of the challan. As soon as a person is enlarged on bail on the directions of anticipatory bail order, it would be deemed by implication as if the bail was granted under Section 437(1). Consequently, the bail shall be effective till the conclusion of the trial, unless it is cancelled by the court taking action under Section 437(5) or under Section 439(a) of the Code on the grounds known to law, and filing of challan in the court is by itself no ground to cancel the bail.[7-"]

In this context it may be noted that the Supreme court in the *Mhetre case*[71 72 73 74 75 76] disapproved the practice of smaller Benches making observations

71. *Gurbaksh Singh Sibbia* v. *State of Punjab.* (1980) 2 SCC 565: 1980 SCC (Cri) 465, 474-75: 19So Cri Lj 112.5; see also,

72. *Balcha?idJain* v. *State ofM.P.,* (1976) 4 SCC 572:1976 SCC (Cri) 689: 1977 Cri Lj 225.

73. *Gurbaksb Singh Sibbia* v. *State of Punjab,* (1980) 2 SCC 565: 1980 SCC {Cri} 465, 491: 1980 Cri LT 1125.

74. *Ibid.*

75. *Ramsewak* v. *State ofM.P.,* 1979 Cri LJ 1485, 1490 (MP); *see* observations in *K.L. Verma* v. *State,* (1998) 9 SCC 548: 1998 SCC (Cri) 1031; *Natturasu* v. *State,* 1998 Cri Lj 1762 (Mad); *C.H.*

76. *Siddharam Satlingappa Mhetre* v . *StaLe ofMaharashtra,* (2011) 1 SCC 694: {2011) 1 SCC (Cri) 514: 2011 Cri Lj

that anticipatory bail should be of limited duration and ordinarily on expiry of the duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter. The Supreme Court found that this view runs counter to the views expressed in *Gurbaksh Singh Sibbia* v. *State of Punjab*[77] *(Sibbia).*

However, it may be noted that the *Sibbia* decision itself gave scope for the practice of smaller Benches, for the Supreme Court therein observed:

> Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period *until* after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.[78]

It seems that anticipatory bail is only to avoid the inconvenience of the accused who has not yet been investigated. If, later on, a prima facie case is found he is to be under the custody of the trial court by way of regular bail order from it.

{k) Cancellation of anticipatory bail—Neither Section 438 nor any other section in the Code makes any clear provision as to whether the order granting anticipatory bail can be cancelled even before the regular bail is actually granted. However, it has been held that when Section 438 permits the making of an order and the order is made for granting anticipatory bail, it is implicit that the court making such an order is entitled upon appropriate consideration to cancel or recall the same.[79 80 81] Anticipatory bail granted to a husband in a case allegedly involving dowry death came to be cancelled by the Madhya Pradesh High Court[80 81] following the Supreme Court decision not to grant anticipatory bail to persons involved in dowry death cases as a matter of course.

(/) *Anticipatory bail in the absence of Section* 438.—So far as the State of Uttar Pradesh is concerned, Section 438 has been omitted from the Code by Section 9, U.P. Criminal Procedure Code (Amendment) Act, 1976. The repealing of Section 438 coupled with the delay in the disposal

77. (1980) 2 SCC 565: 1980 SCC (Cri) 465, 474-75: 1980 Cri Lj 112,5.
78. *Ibid,* 465, 491 [SCC (Cri)].
79. *State of Maharashtra* v. *Vishwas Shripati Patti,* 1978 Cri Lj 1403, 1405 (Bom); *Suresh Vasudeva* v. *State,* 1978 Cri LJ 677, 682 (Dei); see, *Directorate of Enforcement* v. *P.V. Prabhakar Rao,* (1997) 6 SCC 647: 1997 SCC (Cri) 978: 1997 Cri LJ 4654; *Dukhishyam Benupani v. Arun Kumar Bajoria,* G998) 1 SCC 52.: 1998 SCC (Cri)
80. *Chain Singh Dhakad v. Hargovind,* 1991 Cri LJ 33 (MP).
81. *Samttnder Singh* v. *State of Rajasthan,* (1987) 1 SCC 466: 1987 SCC (Cri) 189: 1987 Cri Lj 705; see also, *Hari Om* v. *State of U.P.,* 1992 Cri Lj 182 (All); *Amarnath Gupta* v. *State of M.P.,* 1991 Cri LJ 2163

of bail applications in Uttar Pradesh has prompted the Bar to come up with the pleas for stay of arrest or granting of interim bail.

It was argued that since the Courts of Magistrates and Sessions have jurisdiction to grant ultimate relief of bail, they also have jurisdiction to grant limited relief short of grant of bail by way of releasing offender on personal bond for short periods as immediate relief. As soon as a person surrenders before the court, the police loses the right to arrest. When in such cases the court releases him he is in the custody of the court. According to this view the release on personal bond is nothing but release on temporary bail. The power to do this was located by the court in Sections 437 and 439.[82] This view was, however, overturned by the Full Bench decision in *Vinod Narain* v. *State of* U.P.[83,84,85], wherein the Allahabad High Court categorically ruled that the courts cannot be asked to dispose of bail applications on the same day of their presentation in the courts. Some other States were also thinking or might think of similar amendment. So far as the State of Jammu and Kashmir is concerned, the Code does not extend to the State at all. The Jammu and Kashmir State has its own State Code (similar to the Criminal Procedure Code, 1898) which does not contain any specific provision like Section 438 for granting anticipatory bail.

Can anticipatory bail in some form or other be granted even in the absence of Section 438? The High Court of Jammu and Kashmir seems to take the view that it is possible to do so.[84,85] The High Court read into the provisions of the State Code such a power to grant anticipatory bail. According to the High Court, a person who is not actually arrested by the police but apprehends arrest may "appear" in court and ask for bail. In such a case the person, according to the High Court, in fact surrenders to the custody of the court and thereby there would be notional detention of the person. In such a situation, the requirement of "appearing" envisaged by Section 497 or Section 498 (similar to Ss. 437 and 439 of the Code of 1973) is satisfied, and the court gets power to grant him bail. Thus, even in the absence of any specific provision for granting anticipatory bail, the High Court of Jammu and Kashmir has in a way succeeded in achieving the result aimed at by the provision for anticipatory bail. The question whether an application for anticipatory bail rejected by the Sessions Court can be entertained by the Jammu and Kashmir High Court has been answered in the affirmative.^

The provisions for granting anticipatory bail are not applicable to the offences under Scheduled Castes and Scheduled Tribes (Prevention of

82. *Jssrna* v. *State of IIP.,* 1993 Cri Lj 2432 (AO); *Haji*
83. *Vinod Narain* v. *State of U.P.,* 1996 Cri LJ 1309 (Ail) (FB).
84. *Kali Dass* v. S.H.O., *Police Station,* 1979 Cri Lj 345 (J&K).
85. *Zubair Ahmad Bhat* v. *State of J&K,* 1990 Cri Lj 103 (j&K).

Atrocities) Act, 1989 *vide* Section 18 thereof. This has been held to be constitutional.[86] However, the potential for its abuse came to be discussed by the Rajasthan High Court.[87]

12.7 Powers of appellate court to grant bail

[a] In case of appeal against conviction.—Section 389(1) provides that "pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also if he is in confinement, that he be released on bail or on his own bond".

The analysis of the above rule shows that the appellate court can exercise the power to grant bail only if *i)* the person asking for release on bail is a convicted person, *ii)* he is in confinement, and *Hi)* his appeal against the conviction is pending.

It is interesting to see that the decisions of the Supreme Court have been properly incorporated in the amendment effected to Section 389. The new proviso obliges the appellate court to hear the prosecution before a person who has been convicted of an offence punishable with death or life imprisonment or for a term of not less than 10 years, is granted bail. If by any chance he has been released the prosecution is entitled to file an application for cancellation of his bail.

The question whether the appellate court while exercising its powers under Section 389(1) can suspend the execution of sentence as well as the conviction pending an appeal preferred by a convicted person has been answered in the affirmative.[88] The Madhya Pradesh High Court in *Gopal* v. *State ofM.P.*[89] has stated that an application for bail and suspension of sentence under Section 3 89 is a class by itself maintainable only in a pending appeal. This is an integrated part of the appeal.

Irrespective of whether the offence is bailable or non-bailable the release of the convicted person on bail is entirely at the discretion of the appellate court. The discretion, however, is to be exercised judicially; and the appellate court is required to record reasons for granting bail.[90] In the matter of granting bail, the appellate court should inter alia consider *i)* whether prima facie ground is disclosed for substantial doubt about the conviction; also *ii)* whether there is any likelihood of unreasonable delay in the disposal of the appeal.[91] [6] [9]

S6. *State of M.P.* v. *Ram Kishna Balothia,* {1995) 3 SCC 22.1: 1995 SCC

87. *Girdhari Lai* v. *State of Rajasthan,* 1996 Cri Lj 1613 (Raj); also see, *Phulla Dass* v. *State of Punjab,* 1998 Cri Lj 157 (P&H).

88. V. *Simdararami Reddi* v. *State,* 1990 Cri Lj *167* (All).

S9. 1999 Cri Lj 1438 (MP).

90. See, *Khilari* v. *State ofU.P.,* {2009) 4 SCC 23: (2009) 2 SCC (Cri) 37: 2009 Cri LJ 1740.

91. *Kashmira Singh* v. *State of Punjab,* (1977} 4 SCC 291: 1977 Cri LJ 1764: 1977 SCC (Cri) 559; *Babtt Singh* v. *State ofV.P.,* (1978) 1

The need for granting bail or other similar relief to make appeal meaningful has been reiterated by the Supreme Court in *Bhagwan Rama Sbinde Gosai* v. *State of Gujarat*[93]. In this case the appellant was convicted and sentenced under Section 392 read with Section 397 IPC. His prayer to the High Court for suspension of sentence pending appeal was declined. His alternative request for expeditious hearing of appeal was also declined by the High Court. On appeal the Supreme Court declared that appeal would become meaningful only if it is either heard expeditiously or granted suspension of sentence.

The practice in the Supreme Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 IPC. This practice was evolved on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the court is not in a position to dispose of the appeal for five or six years. Therefore, so long as the appellate court is not in a position to hear the appeal of an accused, within a responsible period of time, the court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail. [92] [93] The Supreme Court has also taken the view that delay in hearing appeal alone is no ground to grant bail.[94]

The power to grant bail conferred by the above rule [S. 389(1)] on an appellate court may be exercised also by the High Court in the case of an appeal by a convicted person to a court subordinate thereto. [S. 389(2}]

{.b) *In case of an appeal against acquittal.*—According to Section 378 an appeal against an order of acquittal can be made only to the High Court. The appeal is to be made by the State or under certain circumstances by the complainant if the order of acquittal has been passed in a complaint case.

When an appeal is presented under Section 378 (that is an appeal against an order of acquittal), the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate court, [3]

3 SCC {Cri} 52: 2008 Cri LJ 2591; *Mann Sharma* v. *State (NCT of Delhi),* (2010) 6 SCC- 1: (2010) 2 SCC (Cri) 1385: AIR zero SC

92. (1999 } 4 SCC 421: 1999 SCC (Cri) 553.

93. *Kashmira Singh* v. *State of Punjab,* (1977) 4 SCC

and the court before which he is brought *may* commit him to prison pending the disposal of the appeal or admit him to bail.[95] [S. 390]

An interesting question was raised in *Omprakash Tekchand* v. *State of Gujarat*[96]. The question was whether a trial court could issue directions on the accused persons who were acquitted by it to furnish bail bonds which would remain in force for a year from the date of acquittal with a view to ensure their presence in the High Court should an appeal against acquittal be filed. The Gujarat High Court responded to this question thus:

> The power under Section 390 of the Code can be exercised only after the appeal is presented and not before it. Therefore, when the High Court itself cannot direct arrest of a person acquitted or admit him to bail until appeal is presented against his acquittal, it obviously cannot direct the trial Court to arrest such accused or admit him to bail even though he is acquitted by the trial Court.[97]

The precautionary measure envisaged by the Gujarat High Court is now reflected in Section 437-A discussed earlier.

The Supreme Court while granting special leave to appeal against an order of acquittal on a capital charge has, by virtue of Article 142 read with Article 136, to exercise the same powers which the High Court has under Section 390. Whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant, is a matter which rests entirely in the discretion of the court. Although the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the court could take into account the various factors such as the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interests of the public and State. In addition, the court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing in the appellate court.[98]

Here the court has full discretion in the matter of bail and it is immaterial whether the offence is bailable or non-bailable. The discretion is of course to be used judicially. The Division Bench of the Orissa High Court has held that the order of acquittal passed in favour of the accused petitioner does not alter his status as an accused against whom a capital charge is made, and that it is neither the practice nor is it desirable that in

95. See also, *Amin Khan* v. *State of Rajasthan*, (2009) 3 SCC 776:

96. 1999 Cri LJ r (Guj).

97 *Ibid*, 7.

98. *State of U.P.* v. *Poosu*, (1976) 3 SCC T: 1976 SCC (Cri)

such cases the accused should be at large whilst his fate is being discussed in the court.[1] However, the Full Bench of the Punjab High Court after considering the decision of the Orissa High Court took a different view and observed, "the true rule should be that the accused-respondents in State appeals against their acquittal on capital charges are normally eligible to be released on bail during the pendency of such appeals unless for grave and exceptional reasons the court directs their detention in custody"[2].

Powers of the courts of revision to grant bail

Section 397(1) provides:

> 397. The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or **order be suspended, and** *if the accused is in confinement, that he be released on bail or on bis own bond pending the examination of the record.*

12.8

Calling for records to exercise of powers of revision

As in case of appeal, here also, the court exercising revisional jurisdiction has full discretion in the matter of bail. The discretion is to be used judicially having regard to all the circumstances of the case.

Power to grant bail where a reference has been made to the High Court

If a criminal court has to decide about the constitutional validity of any enactment, it can make a reference to High Court for the decision of that question. [S. 395(1)] A Court of Session or a Metropolitan Magistrate may refer for the decision of the High Court any question of law which might have arisen in the proceedings before it or him. [S. 395(2)]

Any court making a reference to the High Court as mentioned above under Section 395(1) or Section 395(2) may, pending the decision of the High Court thereon, either commit the accused to jail or *release him on bail to appear when called upon.* [S. 395(3)]

Obviously the court has complete discretion in the matter of bail and the discretion shall be exercised according to the well-established principles of using discretion judicially.

12.9

Release on bail after conviction but before filing appeal

Sub-section {3) of Section 389 provides:

> 389. Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall—

12.10

Suspension *of sentence pending the appeal; release of appellant on bail*

1. *State* v. *Badapalli Adi*, ILR 1955 Cut 589.
2. *State of Punjab* v. *Bachittar Singh*, 1972. Cri LJ 341, 346: *(19pz]* 74 PLR 109 {P&H)

(/) where such person, *being on bail,* is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and *be is on bail,*

order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under subsection (i) [of S. 389]; and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

Before the appeal is actually filed, the appellate court cannot grant bail under Section 389(1). Therefore, when the convicted person intends to file an appeal against his conviction and sentence, this rule contained in Section 389(3) will enable the sentencing court to grant bail for a limited period, he. till the appeal is filed and the appellate court is moved for getting released on bail. The sentencing court is required to grant bail in the two circumstances mentioned in the section, as in such cases it would be unjust to refuse bail. To ensure that refusal of bail in such cases should be in exceptional circumstances, it has been considered desirable to require that special reasons should be recorded by the court before refusing bail under this section.[3 4]

There have been conflicts of judicial opinion with regard to the jurisdiction of the High Court to grant bail under Section 389(3)^ The view that in a case where the accused "intends to present a petition under Article 136 of the Constitution for special leave to file appeal before the Supreme Court", Section 389(3) would not be applicable, seems to be correct.[5]

12.11 Cancellation of bail granted by the appellate, revisional or sentencing court, or of bail granted on reference to High Court

If a court releases a person on bail under sub-section (1) or sub-section (2) of Section 437, then it has got the discretion to cancel the bail or bond and commit that person to custody.[6] [S. 437(5)]

Similarly, if a person has been released under Sections 436 to 450, the High Court or the Court of Session has got the discretion to cancel the bail or bond and to commit that person to custody.[7]

No provision for cancellation of bail appears to have been made in the Code when the bail is granted by the appellate, revisional, or the

3. joint Committee Report, p, xxviL
4. *Abdulla Haji* v. *Food Inspector,* '1986 Cri LJ 1193 {Ker}; *K.M. Salim* v. *State of Kerala,* 1986 Cri LJ 1197 (Ker}; *Mammootiy* v. *Food Inspector,* 1988 Cri I.J 139 (Ker) (FB); also see, *Bhaskaran*
5. *See* the discussions in *Mammootty* v. *Food Inspector,* 1988 Cri Lj 139 (Ker) (FB); see also, *Bhaskaran* v. *State,* 1987 Cri IJ 1588 (Ker).
6. *See supra, para.* 12.5.
7. *Ibid.*

sentencing court, or when the bail is granted on reference to High Court.[8] Is the omission on the part of the legislature due to inadvertence or is it a deliberately intended one? Despite the controversies and the judicial decisions of the higher courts including those of the Supreme Court, the legislature while enacting the new Code in 1973 allowed the same omission to remain in the relevant provisions of the Code. Therefore, it is rather difficult now to say that the omission was due to inadvertence only. On the other hand, if we conclude that the omission was deliberate and intended one, and therefore, do not permit the High Court to invoke its inherent powers to cancel the bail when the person released on bail is grossly abusing the freedom, the consequences would be disastrous—disastrous to the society, ruinous to the administration of justice, and even disadvantageous to the accused persons themselves. Because, very few persons who are convicted to grave crimes will be granted bail during the pendency of their appeals if the courts granting bail (including the High Court) were to be precluded from cancelling the bail even if the man who got the bail by protesting his innocence repeats the offences a number of times during the ball period.[9]

A clear provision, like the one in Section 439(2) enabling the High Court or other appropriate courts to have the power to cancel bail in suitable cases in the abovementioned situations would have been welcome. The omission to make such a provision is rather a serious lacuna in the Code. After conceding all this, it is suggested that, in the interests of justice, the High Court should invoke its inherent powers under Section 482 and cancel the bail wherever it thinks it fit to do so. This view would get support from the various decisions under the old Code of 1898.[10] It is submitted that courts are more likely to follow' and adopt the same viewpoint in future till the Code is suitably amended.

The Madhya Pradesh High Court has recently reiterated that the bail granted under Section 389 cannot be cancelled under Section 439(2) inasmuch as the persons who are granted bail under Section 389 are not accused but convicted persons. Also the sentence is only kept in abeyance but not set aside.[11] The court has, however, asserted that it can recall the order of release.[12] It is interesting to see that the second proviso added to

8. *See supra*, paras, 12.7, 12.8, 12.9, 12.10 and refer to Ss. 389(1} and (2), 390,
9. *Public Prosecutor* v. *George Williams.* 1952 Cri LJ 213, 214: AIR 1951 Mad
10. *Pampapathy* v. *State of Mysore*, 1967 Cri Lj 287: AIR 1967 SC 286; *Public Prosecutor* v. *George Williams*, 1952
11. *Ganesh Narayan Hegde* v. S. *Bangarappa*, (1995) 4 SCC 41: 1995 SCC (Cri) 634: 1995 Cri Lj 2935; *Union*
12. *State ofM.P.* v. *Chintaman*, 1989 Cri Lj 163 (MP).

Section 389(1} empowers the Public Prosecutor to file an application for the cancellation of bail granted to a convicted person.

12.12 General provisions regarding bond of accused and sureties

(a) Amount of bond and reduction thereof.—The amount of every bond executed under Chapter XXXIII of the Code (dealing with provisions as to bail and bonds) shall be fixed with due regard to the circumstances of the case and shall not be excessive. The High Court or the Court of Session may direct that the bail required by a police officer or Magistrate be reduced. [S. 440]

The amount of the bond which the court fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending upon the individual financial circumstances of the accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge.[15]

Moreover, the inquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond.[13 14]

(b) Conditions and execution of bond.—When a person is to be released on bail, it contemplates *i)* the furnishing of a personal bond by such person, and *it)* a bond by one or more sureties. In this connection Section 441 provides as follows:

Bond of accused and sureties

441. (1} Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may

13. *Hussainara Kbatoon (1)* v. *State of Bihar,* (1980) 1 SCC 81: 1980 SCC (Cri) 23: 1979 Cri Lj 1036; N. *Sasikala* v. *Directorate of*
14. *Hussainara Kbatoon (j)* v. *State of Bihar,* (1980) 1 SCC 81: 1980 SCC (Cri) 23: 1979 Cri IJ 1036.

either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness.

If the time and place for the appearance of the accused is not mentioned in the bond at all, the bond is then vague and therefore void.[13]

The practice of some persons standing surety for several accused indiscriminately throwing the system of releasing persons on bail out of gear is proposed to be contained by the enactment of new Section 441-A which runs as follows:

Declaration by

M441-A. Every person standing surety to an accused person for his release on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars.]

The court is also given the right to remit any portion of the penalty- imposed by it on forfeiture of the bond. But it should be ordered after recording its reasons for doing so.

When more than one accused are released on bail, court should insist on separate bonds being executed by each of the accused with sureties. Form No. 45 in Schedule II [given in sub-para, *(c)* below] is designed for a single accused. It is, therefore, incumbent that the court should get separate bonds executed by individual accused and the concerned sureties. The Code does not contemplate a consolidated bond being executed either by the persons directed to be released or by the sureties. If the same sureties are to execute bonds, then sufficiency as contemplated by Section 441 should be considered with reference to all the persons taken together and the undertaking should be that they would be liable for the amount specified in respect of each of the accused.[15 16 17] It has been asserted that the exercise of discretion under this section is quasi-judicial.[15 16 17 18]

The Supreme Court has clarified that the duty of the surety is the production of accused for bail. In case of any change in the terms and conditions under which the accused is granted bail is not acceptable to the surety-, he should communicate the same to the court failing which he will be held liable.[19]

Section 445 makes an enabling provision for a substitute for the execution of the bond under certain circumstances. The section provides:

445. When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government

Deposit htstead of recognizance

15. *Cbhaganlal Kikabbai* v. *State of Gujarat** 1969 Cri LJ 1164 (Guj); *Bholu* v. *State,* 1952. Cri Lj 974: AIR 1952 Pmij 2 28.
16. *Ins.* by Act 25 of 2005, S. 39 {w.e.f. 23-6-2006}.
17. *Kunju Mohammed* v. *Judicial Magistrate's Court** 1982 Cri LJ 475, 477 *Gwalior** 1990 Cri Lj 2550 (MP).
19. *Mohd. Kunju* v. *State of Karnataka** (1999) 8 SCC 660: 2000 SCC (Cri) 34.

promissory notes to such amount as the Court or officer may fix in lieu of executing such bond.

Cash deposit in lieu of execution of a bond by the accused is an alternative system of granting bail and is no less efficacious than granting bail of certain amount with or without surety or sureties of the like amount.[20]

(c) The form of bond.—The bond and the bail-bond contemplated by Sections 436, 437, 438(3) and 441 are to be given in the form as prescribed in the Second Schedule. The form is as given below:

FORM NO. 45

BOND AND BAIL-BOND FOR ATTENDANCE BEFORE OFFICER IN CHARGE OF

POLICE STATION OR COURT

[SEE, Ss. 436, [21] [436-A,] 437, [22][437-A] AND 438(3) AND 441]

I, *{name),* _____ of _____ *{place),* having been arrested or detained without warrant by the Officer in charge of _____ police station (or having been brought before the Court of _____}, charged with the offence of_____ , and required to give security for my attendance before such Officer or Court on condition that I shall attend such Officer or Court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default herein, I bind myself to forfeit to Government the sum of rupees _____ .

Dated, this_____day of _____ , 2.0 _____ .

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety {or sureties) for the abovesaid *{name)* _____ that he shall attend the Officer in charge of _____ police station or the Court of _____on every day on which any investigation into the charge is made or any trial on such charge is held, that he shall be, and appear, before such officer or Court for the purpose of such investigation or to answer the charge against him (as the case may be), and, in case of his making default herein, I hereby bind myself *{or* we, hereby bind ourselves) to forfeit to Government the sum of rupees _____.

Dated, this_____day of _____ , 20_____ .

(.Signature)

(d) Discharge from custody.—In this connection the relevant provision is contained in Section 442 which reads as follows:

Discharge from

442. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in

(z) Nothing in this section, Section 436 or Section 437 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

{e} Sufficiency of sureties and discharge of sureties.—**Sections 443 and 444 provide as follows:**

443. If, through mistake, fraud, or otherwise, insufficient sureties have been accepted, or if they afterwards, become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

Power to order sufficient bail when that first taken is insufficient

444. (r) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

Discharge of sureties

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to jail.

{f) Bond if required from a minor.—Section 448 provides that when the person required by any court or officer to execute a bond is a minor, such court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

Procedures in case of forfeiture of bond or in case of insolvency or death of surety

These matters have been provided by Sections 446, 446-A, 447, 449, 450. These sections are as follows:

446. (1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited,

or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of. such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

12.13

Explanation.—A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

Procedure when bond has been forfeited

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code:

[23][Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]

(3) The Court may, [23][24][25][after recording its reasons for doing so], remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

{5) Where any person who has furnished security under Section 106 or Section 117 or Section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under Section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.

It has been pointed out by the Himachal Pradesh High Court that no provision of the Code authorises an appellate court to obtain a bond for personal appearance from an appellant filing an appeal against the order of his conviction and sentence of fine.[23][24][25]

The obvious requirement of the rule of natural justice is that a person against whom an adverse order is passed is given an opportunity of being heard. Therefore, before forfeiting the surety bond, the court should give notice to surety to show cause as to why the surety bond be not forfeited.[26] It has also been held that before a surety, whose surety has been forfeited, is imprisoned, a notice under Section 421 should be served on the Collector and if the Collector pleads inability to recover the amount, he should be sent to prison.[27]

No indication is to be found in Section 446(3) as to the circumstances under which the court will be justified in making an order in conformity with Section 446(3). It is settled by various decisions of the High Courts that a case for the exercise of the discretion under Section 446(3) will properly arise in cases where the accused has been subsequently arrested or the amount forfeited is excessive and the surety is unable to pay. While exercising discretion under Section 446(3) it is not irrelevant to consider in such cases whether the surety did not act irresponsibly and there was no connivance or negligence on the part of the surety.[28]

23. *Ins.* by CrPC (Amendment) Act, 19S0 (63 of 1980), S. 6 (w.e.f.

24. *Subs,* for *"at its discretion"* by Act 25 of 2005, S. 40 (w.e.f.

25. *Kamla* v. *State of H.P.,* 1987 Cri LJ 1838 (HP).

26. *Mahmood Hasan* v. *State,* 1979 Cri LJ 1439 (Ail).

27. *C.M. Eisaw* v. *State of Karnataka,* 1989 Cri LJ 1159 (Kant).

28. *Dayal Cband* v. *State of Rajasthan,* 19S2 Cri LJ 1008,

Bail bond **12.13.1**

In *Jagtar Singh* v. *State of Pun jab*[19], the Punjab and Haryana High Court answered the question whether a surety whose bond has been forfeited and who is unable to pay the penalty can be sentenced to imprisonment in the negative.

[30][446-A. Without prejudice to the provisions of Section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition—

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and *b)* thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition:

Cancellation of bond and bail-bond

Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient.]

447. When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of Section 446, the Court by whose order such bond was taken, or a Magistrate of the first class may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

Procedure in case of insolvency or death of

449. All orders passed under Section 446, shall be appealable,—

(;} in the case of an order made by a Magistrate, to the Sessions Judge;

(it) in the case of an order made by a Court of Session, to the Court to which an appeal lies from an order made by such Court.

Appeal from orders under Section 446

450, The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond for appearance or attendance at such High Court or Court of Session.

Power to direct levy of amount due on certain recognizances

Some observations on the operation of the bail system **12.14**

The enormous problem of the undertrial prisoners was brought to the notice of the Supreme Court in *Hussainara Khatoon (1)* v. *State of Bihar*[31]. That case disclosed a shocking state of affairs in the State of Bihar in regard to administration of justice. It was an amazing discovery to the court and to everybody else that an alarmingly large number of men and

Simopuruskar v. *State,* 19S9 Cri LJ 1264 (Bom); *O.P. Anand* v. *State,* 1989 Cri IJ 2468 (Del). *19.* 1980 Cri Lj 1511 {P&H).

30. *Ins.* by CrPC (Amendment) Act, 1980 (63 of 1980), S. 7 (w.e.f. 23-9-19So}.

31. (1980) T SCC Si: 1980 SCC (Cri) 23: 1979 Cri Lj 1036.

women were behind the prison bars for years awaiting trial in courts of law. The offences with which some of them were charged were trivial which even if proved would not warrant punishment for more than a few months, perhaps for a year or two; and yet these unfortunate persons continued to languish in jails for periods ranging from 3 to 10 years without even as much as their trial having commenced. These people were kept behind the bars not because they were found guilty, but because they were too poor to afford bail and the courts had no time to try them.

In this context Bhagwati J observed:

> One reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system. It suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment, continues to adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences.[32]
>
> It is high time that our Parliament realises that the risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing. ... Parliament would do well to consider whether ... considerations such as family ties, roots in the community, job security, membership of stable organisations etc., should be the determinative factors in grant of bail and the accused should in appropriate cases be released on his personal bond without monetary obligation. Of course, it may be necessary in such a case to provide by an amendment of the penal law that if the accused wilfully fails to appear in compliance with the

32. *Ibid,* 26-2.7 [SCC (Cri)j.

promise contained in his personal bond, he shall be liable to penal action. But even under the law as it stands today the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail wdth sureties.[33 34 35 36 37]

Pathak J felt that there was urgent need for an explicit and clear provision in the Criminal Procedure Code enabling the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any monetary obligation.[33 34 35 36 37]

The need for providing adequate legal aid to undertrial prisoners seeking release on bail was stressed by Bhagwati J when he observed:

It is not uncommon to find that undertrial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. ... This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response.[55]

In *Moti Ram* v. *State of M.PF*[6], Krishna Iyer J observed:

We leave it to Parliament to consider whether in our socialist republic, with social justice as its hallmark, monetary superstition, not other relevant considerations like family ties, roots in the community, membership of stable organisations, should prevail for bail bonds to ensure that the 'bailee[5] does not flee justice. The best guarantee of presence in court is the reach of the law, not the money tag. A parting thought. If the indigents are not to be betrayed by the law including bail law, re-writing of many processual laws is an urgent desideratum; ... T

The need for legislative changes in the bail system is obvious, more so in the context of the glaring problem of undertrial prisoners. The judges of the Supreme Court have exhorted in unmistakable terms for legislative reforms as mentioned above. Yet there does not seem any official indication, proposal, or move for making any statutory changes in our bail law. The only change that was made by the Code of Criminal Procedure (Amendment) Act, ipBo was quite in a different direction, namely to make the bail law more stringent so as to make the release on bail extremely difficult for persons previously convicted of serious crimes or for habitual offenders.

33. *Ibid,* 2.9.
34. *Ibid,* 33.
35. *Hussainara Khatoon (4)* v. *State of Bihar,* (1980) 1 SCO 98: 1980 SCC (Cri) 40, 45: 1979 Cri LJ [10]45.
36. {1978) 4 SCC 47: 1978 SCC (Cri) 485, 490: 1978 Cri Lj 1703, 1706.
37. *Ibid,* 495-96 [SCC (Cri)].

At this juncture it has to be noted that the legislature positively responded in effecting necessary changes in 2005 and 2009 discussed earlier. The proviso and Explanation added to Sections 436, 436-A, etc. have definitely empowered the courts to protect the liberty of indigent accused.

12.15 Speedy hearing of special leave petitions against orders refusing bail

The Supreme Court has pointed out that the question whether special leave petitions against refusal of bail should be listed immediately or not is a question within the administrative jurisdiction of the Chief justice. The Bench which heard the question in *Bihar Legal Support Society* v. *Chief justice of India*[35] therefore did not issue any direction.

The petitioner-society prayed that the speed with which special leave petitions of some VIPs were heard should be adopted in the case of poor and "small men" in the country. The court asserted that it gives preferential treatment to the poor and the disadvantaged.

The Patna High Court has held that except in certain categories of offences, the delay in hearing the appeals due to the court should make an appellant entitled to bail inasmuch as the imprisonment prior to the final order is not desirable in any sense. Barring exceptions the reasonable period of time for the hearing of appeals on capital charges has been placed at one year.[38] [39]

12.16 Police to disclose pending cases

In a case where the accused was re-arrested in connection with a pending case which was not disclosed by the police, immediately after his release on bail, it was held that the police should disclose all pending cases against him. Such particulars should be described in the forwarding report by which the accused is produced before the Magistrate or to disclose such particulars at any time to the Magistrate before the accused is enlarged on bail.[38] [39] [40]

12.17 Bail applications can be moved when remand application is moved by the police

When in a case the police asked for the remand of an accused in his absence, after his two applications for bail have been rejected, the Magistrate granted him bail.[41] Justifying the Magistrate's act, the Delhi High Court observed:

38. (1986} 4 SCC 767: 1986
39. *Anttrag Baitba* v. *State*
40. *A. Loso* v. *State of*
41. *K.K. Gircihar* v. *M.S.*

Whenever an application for remand of an accused is moved on behalf of the prosecution, it has to be prepared for the opposition to the same and for a prayer for the release of the accused on bail. For that purpose an application opposing the remand and for bail can be moved instantly, even if some application for bail moved earlier is pending and is posted to a future date. The learned Magistrate was bound to deal with the application of remand and the bail application together at one and the same time and without further postponement of the hearing of either of them.[42 43 44 45 46]

Forum-shopping or Bench-hunting 12.18

The superior courts in India have identified the salient factors which should govern the exercise of discretion to grant or not to grant bail to an accused. These have indeed helped many a lower courts to take appropriate decisions. However, the freedom still available to the judges in this field has given rise to an undesirable practice of what may be called forum-shopping or Bench-hunting under which an applicant for bail after his application having been either rejected or having got withdrawn as not pressed, moves it before another Bench and gets the bail even when the Bench before which it came first, is available.

This practice came to be deprecated by the Supreme Court in *Sbabzad Hasan Khan* v. *Ishtiaq Hasan Khan*[43] *[Sbabzad Khan)* in which the court ruled that "judicial discipline requires that such matter must be placed before the same judge, if he is available for orders". The court's criticism have had not much impact. For in *State of Maharashtra* v. *Buddhikota Subha Rao (Capt.)*[44 45 46] the court had to reiterate what it said in *Sbabzad Khan.* The practice appears to continue atleast in certain parts as is evidenced in the decision in *Padam Chand Jain* v. *State of Rajasthan***.

New trends 12.19

The courts have been exercising extreme caution in granting bail to accused involved in dowry death cases. The caution administered by the Supreme Court in the *Samunder Singh case*[46] seems to have been very well taken. It is abundantly evident from the frequent cancellations of bail granted to such accused particularly at the instance of the deceased's relative(s) along with the prosecution.[47]

42. *Ibid.* 1096.
43. {1987) 2 SCC 684: 1987 SCC (Cri) 415: 1987 Cri Lj 1872. *See* the response as to the purpose of this ruling as per the Madhya Pradesh High Court in *Munna Singh Tomar* v. *State of M.P.*, 1990 Cri Lj 49 (MP); *State ofM.P.* v.
44. 1989 Supp (2 } SCC fro 5: 19(9 0 SCC (Cri) 126: 1989 Cri LJ 2.317.
45. 1991 Cri Lj 736 (Raj); see also, *Mahendra Singh* v. *State of U.P.*, 1997 Cri Lj 4099 (All).
46. *Samunder Singh* v. *State of Rajasthan*, (1987) 1 SCC 466: 1987 SCC (Cri) 189: 1987 Cri Lj 705. Applying the ratio of this decision Delhi High Court granted bail to accused in *Parueen Malbotra* v. *State*, 1990 Cri LJ 1977 {Del).
47. See for example, *Chain Singh Dbakad* v. *Hargovind*, 1991 Cri LJ 33 {MP); *Amarnath Gupta* v. *State of M.P.*, 1991 Cri Lj 2163 {MP); *Padam Chand Jain* v. *State of Rajasthan*, 1991 Cri Lj 736 (Raj); *Hari Ora* v. *State of* D.P., 1992 Cri Lj 182

Another important trend one notices is the mounting criticism of lower courts by the higher courts.[48] The vehemence of criticism goes to great extent thus: "These are, therefore, sufficient reasons to doubt the honesty and integrity of the learned Sessions Judge."[49]

In *Virender Prasad Singh* v. *Rajesh Bhardwaj*[50 51], the Supreme Court had occasion to criticise the grant of bail by a High Court. The court's observations are pertinent:

> ... What flabbergasts us is that on this broad plea, the High Court granted eight month's provisional anticipatory bail to Respondent r/accused. Very strangely, all this was in the backdrop of the rejection of aii the applications made by the accused under Section 438 CrPC before all the courts including this Court.[9 52 53]

One may not be in a position to examine the justifiability of this criticism in view of the fact that these judges are also invested with discretion. The trend has taken a new turn as indicated in the decision in *Vikramjit Singh* v. *State of M.PJ*[2 53] In this case one accused got bail after submission of charge-sheet from a Single Bench of the High Court after having been rejected bail twice by the Sessions Court and once by the High Court. When his co-accused sought for bail, another judge after having granted bail said that such persons do not deserve bail. Thereupon the State Government moved application for cancellation of bail of all accused in the case.

The Supreme Court was approached by the accused by way of special leave petition. Granting leave the court said:

> It appears that the learned Judge while passing the impugned order, failed to appreciate that no bench can comment on the functioning of a coordinate bench of the same court, much less sit in judgment as an appellate court over its decision[A3]

The policy of the legislature to make certain parts of the Code applicable to the investigation into crimes under special enactments like Forest Acts, Narcotic Drugs and Psychotropic Substances Act, 1985, etc. perhaps call for a review. While it has been correctly held that the officers governed by these enactments are not police officers,[54] the question whether protective

48. *State of* M.P. v. *Gy a?? Singh,* 1992 Cri LJ 192 (MP); *State of Karnataka* v. *Narayanappa,* 1992 Cri Lj 225 (Kant); *N.K.S.M. Shahul Hameed* v. *Mohd. Ibrahim,* 1992 Cri I.J 2.2.7 (Mad); *Man Singh* v. *Ganga Singh,* 1991 Cri Lj 128 (Raj); *State of Maharashtra* v. *Anand Cbintaman Dighe,* (1991} 3 SCC

49. *State of M.I*[1]. v. *Gyan Singh,* 1992 Cri Lj 192, 195 (MP).

50. {2010} 9 SCC 171: (2010) 3 SCC (Cri) 1169: 2010 Cri LJ 4275.

51. *Ibid,* xi73.

52. 1992 Supp (3) SCC 62: 1992 SCC (Cri) 964: 1992 Cri LJ 516.

53. *Ibid,* 517 (Cri Lj).

54. *See* discussions in *Raj Kumar Karwai* v. *Union of India,* (1990) 2 SCC 409: 1990 SCC (Cri) 330: 1991 Cri Lj 97 pointing our that the hallmark of police is the requirement of submitting report under S. 173 of the Code, is not applicable to

provisions provided for in the Code including bail would be available to persons arrested by these officers has been answered differently by the courts. This becomes quite relevant in the case of remand and bail. The inter-relationship between the provisions like Sections 167(2.) and 439 on the one hand and the relevant provisions in the special enactments like Section 37, NDPS Act, 1985 on the other hand, has given rise to conflicting judgments.[55]

In a case bail came to be granted in petition under Section 48Z on grounds usually mentioned in connection with grant of bail. The Supreme Court had not approved it though.[56] Instead, the court deprecated this trend. This is to help the accused avoid surrendering before the court as required under Section 439 of the Code.[57]

It is interesting to note that absence of a provision enabling grant of anticipatory bail in certain cases has given rise to some developments. Some courts issued orders restraining police from arresting the accuseds till their request for bail had been examined. Some other courts developed what is called power to grant interim bail on the day of application itself or the stay of operation of orders of bail. Indeed, the appellate courts have been vigilant in identifying these developments and straightening the law as has been evidenced in the case of power for ordering interim bail. The appellate court has derived the existence of such a power/[58]

The approach of the Supreme Court in exercising restraint on granting anticipatory bail is also noteworthy.[59] Its observations in *State represented by CBI* v. *Anil Sharma*[60], signify a balanced view. The court observed:

> We find force in the submission of the CBI that custodial interrogation is qualitatively more eiicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. ... Success in such interrogation would elude if the suspected person knows that he is

Internal Revenue.

55. *See* the discussions in *Arauind Mahram Patel* v. *Intelligence Officer, Narcotics Control Bureau,* T991 Cri IJ 3S2 (Bom); *Prajesb Shantilal Vaghani* v. *Intelligence Officer, Narcotics Control Bureau,* 199c Cri Lj 903 (Bom); *Prahlad* v. *State of Maharashtra,* 1991: Cri LJ 1537 (Bom); *Sanatan Sahu* v. *State of Orissa,* 1992 Cri LJ 352 (Ori). Of course the Supreme Court has ruled in *Narcotics Control Bureau* v. *Kishan LaL* (1991) 1 SCC 705: T99T SCC (Cri) 265: j.991 Cri LJ 654 that S. 439 of the Code is subject to S. 34, NDPS Act. 1985. *Also see,* conflicting judgments of the Karnataka High Court in *Shankar Nayak* v. *State of Karnataka,* 1991 Cri IJ *1468* (Kant) and *Gaffarsab* v. *State of Karnataka,* 1991 Cri IJ 2136 (Kant). The forceful arguments in relation to Customs Act and the Code provisions in *Directorate of Revenue Intelligence* v. *M.K.S. Abu Bucker,* 1990 Cr; LJ 704 (Mad) are also worth consideration.
56. *Panful Nessa v. Mohd. Miraj All,* (2008} 7 SCC 759: {2008) 3 SCC (Cri) 233: 2008 Cri Lj 4545
57. See, *H ami da* v. *Rashid,* (2008) 1 SCC 474: (2008) x SCC (Cri) 234: 2007 Cri Lj 3422.
58. *See infra,* discussions at pp. 223-224.
59. *See,* observations in *Dukhishyam Benupani* v. *Arun Kumar Bajoria,* (1998) 1 SCC 52: 1998 SCC (Cri) 261.
60. *State* v. *Anil Sharma,* (1997) 7 SCC 187: 1997 SCC (Cri) 1039.

well protected and insulated by a pre-arrest bail order during the time he is interrogated.[61 62 63]

The controversies and conflicts that are usually associated with exercise of discretionary powers that too when they are concurrently provided for in the statute are abundantly evident in the case of granting of bail. The decision in *Sompal Singh* v. *Sunil Ratbi*[62] stands proof to the above statement. In this case Sunil Rathi allegedly shot dead the brother of Sompal Singh in the presence of his other brothers. The bail granted to Sunil Rathi was got cancelled by the Supreme Court on the petition of Sompal Singh. The Supreme Court remanded the petition to the High Court. The judge before whom it came for hearing directed it to be placed before the judge who granted the bail in the first instance. He ordered grant of bail instead of considering the matter de novo in the light of the observations made by the Supreme Court. The whole effort of the judge has been to give justification for the order earlier passed by him. He asserted that he applied his mind in granting bail earlier. The judge also opined that the Supreme Court should not interfere in such matters. When an appeal is filed against an order of the High Court granting bail to an accused, it should be decided by the Supreme Court in accordance with the observation made in the *Bihar Legal Support Society case*[63], meaning thereby that the Supreme Court should not have interfered with his earlier order granting bail to the respondent. This situation made the Supreme Court to react thus:

> In the hierarchical judicial system, it is not for any court to tell a superior court as to how a matter should be decided when an appeal is taken against its decision to that superior court. Such a course would be subversive of judicial discipline on the bedrock of which the judicial system is founded and finality is attached and orders are obeyed. We do not consider it proper to say anything further and would like the matter to rest there.[64]

The Supreme Court did not approve the grant of bail by the judge of the High Court.

61. *ibid.*
62. (2,005} ' SCC 1: AIR 2.005 SC 1483.
63. *Bibar Legal Support Society* v. *Chief Justice of India*, {198 6) 4 SCO 767: 1986 SCC (Cri) 537: 1987 Cri Lj 313.
64. *Ibid.*

Chapter 13

Trial Procedures: Principal Features of Fair Trial

Concept of fair trial **13.1**

At the present stage of civilization, it has been universally accepted as a human value that a person accused of any offence should not be punished unless he has been given a fair trial and his guilt has been proved in such trial. The notion of fair trial, like all other concepts incorporating fairness or reasonableness, cannot be explained in absolute terms* Fairness is a relative concept and therefore fairness in criminal trial could be measured only in relation to the gravity of the accusation, the time and resources which the society can reasonably afford to spend, the quality of available resources, the prevailing social values, etc. However, leaving aside the question of the degree of fairness in the criminal trial, the basic essential attributes of fair trial can be identified and studied.

The major attributes of fair criminal trial are enshrined in Articles 10 and 11 of the Universal Declaration of Human Rights.[1] These articles provide:

> Everyone is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him. [Art. 10]
>
> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. [Art. 11]

1. Adopted and proclaimed by the General Assembly on 10-12-1948.

Our courts have recognised that the primary object of criminal procedure is to ensure a fair trial of accused persons;[2] and the Law Commission has accepted the view that the requirements of a fair trial, speaking broadly, relate to the character of the court, the venue, the mode of conducting the trial (particularly trial in public), rights of the accused in relation to defence and other rights.[3]

The present chapter attempts to give an overview of the attributes of a fair trial while the next few chapters discuss in greater detail the scope and functions of some vitally important elements of fair trial.

13.2 Adversary system

The system of criminal trial envisaged by the Code is the adversary system based on the accusatorial method.[4] In this system the prosecutor representing the State {or the people) accuses the defendant (the accused person) of the commission of some crime; and the law requires him to prove his case beyond reasonable doubt. The law also provides fair opportunity to the accused person to defend himself. The judge, more or less, is to work as an umpire between the two contestants. Challenge constitutes the essence of adversary trial and truth is supposed to emerge from the controverted facts through effective and constant challenges.[5] Experience has shown that adversary system is by and large dependable for the proper reconciliation of public and private interests, *i.e.* public interest in punishing the criminals and private interest in preventing wrongful convictions. The system of criminal trial assumes that the State using its investigative resources and employing competent counsel will prosecute the accused who, in turn, will employ equally competent legal services to challenge the evidence of the prosecution.[6]

The above assumption has been found to be incorrect in one respect, particularly under the existing conditions in India. Most of the accused persons here are uneducated and poor. They can not afford to engage lawyers for their defence, nor have they any legal knowledge and professional skill to safeguard their interests themselves. Therefore, though the adversary system envisages equal legal rights and opportunities to the parties to present their respective cases before the court, such legal rights and opportunities would in practice operate unequally and harshly, affecting adversely the poor indigent accused persons who are unable to engage competent lawyers for their defence. The system therefore departs from

2. *Talab Haji Hussain* v. *Madhukar Purshottam Mondkar,* 1958 Cri LJ 701, 704: AIR 1958 SC 376; *Iqbal Ismail Sodawala* v. *State of Maharashtra,* (1975) 3 SCC 140: 1974 SCC (Cri) 764s 770: 1974 Cri LJ izjr.

3. 37th Report, p. z, para. 8.

4. Report of the Expert Committee on Legal Aid, p. 70.

5. *Ibid.*

6. *Ibid.*

its strict theoretical passive stance and confers on the accused not only a right to be defended by a lawyer of his choice, but also confers on the *indigent* accused person a right to get legal aid for his defence at States' cost.[7] [8] It has been held by the Supreme Court that unless refused, failure to provide free legal aid to an indigent accused would vitiate the trial, entailing setting aside of the conviction and sentence.® These matters have been further discussed in the next chapter.

Further, apart from attempting to give legal aid to the indigent accused persons, the Code has suitably altered the notions of judge-umpire. The judge is not to remain passive as an umpire; but he has to play a more positive and active role for protecting the public interests as well as the individual interests of the accused person. For instance, as will be seen later, the charge against the accused is to be framed not by the prosecution but by the court after considering the circumstances of the case; *[see,* Ss. 228, Z40] the prosecutor cannot withdraw the case without the consent of the court; [S. 321] certain offences cannot be compounded without the permission of the court; [S. 3Z0] the court has been empowered to examine any person as a witness though such person has not been called by any party as a witness; [S. 311] the court can examine the accused at any time to get explanations from him; [S. 313] the court may or may not accept the "plea of guilty" of the accused person. [Ss. 229, 241, 252, etc.]

Explaining the proper function of the judge in an adversary system of trial, the Supreme Court has observed:

> The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest... .[9]

Though the notion of adversary system of trial has undergone some transformation by legislative prescriptions and judicial gloss, it can still be reasonably considered as an essentially important component of the concept of fair trial.

7. ***See,*** S. 303 of the Code and Art. 22.(1} of the Constitution; S. 304 of the Code, and Art. 21 of the Constitution as construed by the Supreme Court in ***Hussainara***
8. ***SukDas*** v. UT ***of Arunachal Pradesh,*** (1986 } 2 Si CC 401:19 86
9. ***Ram Chanaer*** v. ***State of Haryana,*** (1981) 3 SCC 1.91: 1981 SCC (Cri)

13.2.1 *Trials*

It is relevant to note that the Supreme Court adversely commented upon the functioning of the courts below. In ***Vajresh Venkatray Anvekar*** v. ***State of Karnataka***[10] the insensitivity of the trial judge to offences against women in expressing that one or two beatings might not lead a woman to commit suicide, was not appreciated by the Supreme Court. In yet another case from Karnataka High Court viz. ***P. Nagesh*** v. ***State of Karnataka***[11][12][13], the Supreme Court was not happy that the High Court did not properly deal with the questions raised by the appellant. The case was remitted to the High Court.

The Supreme Court was not happy with the way the trial was conducted in ***Gurnaib Singh*** v. ***State of Punjab***[2] as well. The court referred to the haphazard way the trial was conducted describing it as disturbing scenario.

13.3 Presumption of innocence

The principle that the accused person is presumed to be innocent unless his guilt is proved beyond reasonable doubt, is of cardinal importance in the administration of criminal justice![3] The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused.[14] Every criminal trial begins with the presumption of innocence in favour of the accused; and the provisions of the Code are so framed that a criminal trial should begin with and be throughout governed by this essential presumption.[15][16]

However, a note of caution was struck by the Supreme Court regarding the application of this principle. It observed:

> The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go out but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community![6]

10. (2,013) 3 SCC 462: Corj) 3 SCC (Cri) 227.
11. (2.013) 7 SCC 285: (2013) 3 SCC (Cri) 321.
12. (2015) 7 SCC 108: (2013) 3 SCC (Cri) 49.
13. *Babu Singh* v. *State of Punjab,* (1964) 1 Cri Lj 566, 572; *K.M. Nanauati* v. *State of Maharashtra,* (1962) 1 Cri Lj 521, 535: AIR 1962 SC 605.
14. *Kali Ram* v. *State of H.P.,* (1973) 2 SCC 808: 1973 SCC (Cri) 1048, 1059;
15. *'Tala b Haji Hussain* v. *Madbukar Purshottam Mondkar,* 1958 Cri LJ 701, 704: AIR 1958 SC 376.
16. *Shivaji Sababrao Bobade* v. *State of Maharashtra,* (1973) 2 SCC 793: 1973 SCC (Cri) 1033, 1039-. 1973 Cri Lj 1783, 1788.

In a iater decision, however, the court again re-emphasised the necessity of having the principle of "presumption of innocence". It observed:

> It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the convic- tion of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society.[17]

The criticism directed against the principle of "presumption of innocence" appears to be more a criticism of the manner in which this principle and the principle of giving the accused the benefit of doubt, has been applied and misused by weak and incompetent judges.[18]

This becomes clear when one examines the decisions of various courts including the Supreme Court which have had occasions to dwell on this. Analysing the proclivity of the police to take advantage of the courts' tendency to look for proof beyond doubt, in cases where they are accused of serious crimes like custody killing, the Supreme Court pointed out that exaggerated adherence to the establishment of proof may make the system a suspect. Courts' observations are pertinent:

> The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect.[19]

As mentioned earlier, the principle of "presumption of innocence" is undoubtedly an essential attribute of fair trial.

13.4

Independent, impartial and competent judges

The most indispensable condition for a fair criminal trial is to have an independent, impartial and competent judge to conduct the trial. The Code, as mentioned earlier,[20] has provided for the separation of the judiciary from the executive. The separation would ensure the independent functioning of the

17. ***Kali Ram*** v. ***State ofH. P***., (1973} 2 SCC 80S: 1973 SCC (Cri) 1048, 1061: 1974 Cri LJ 1, 11; see also, ***Dharm***
18. 14th Report, Vol. II, p. 836.
19. ***State of M.P.*** v. ***Sbyamsunder Trivedi,*** (1995) 4 SCC 262: 1995 SCC (Cri) 715, 725.
20. ***See supra,*** para. 2.4.

judge or Magistrate is made by the government, the judge or Magistrate thereafter works only under the direct control and supervision of the High Court and not of the government. In order to have fair trial it is necessary that the judge or Magistrate must not be in any manner connected with the prosecution or interested in the prosecution. This principle has been, to an extent, recognised and given effect to by Section 479.

Fair trial also requires public hearing in an open court. Section 327 makes provision for open court generally accessible to the members of the public.[21] [22] [22] These and other matters pertaining to the independence, impartiality and competence of the criminal courts have been discussed in the next chapter.

13.5 Venue of the trial

The provisions regarding venue, *i.e.* the place of inquiry or trial, are contained in Sections 177 to 189.™ If the place of trial is highly inconvenient to the accused person and causes various impediments in the defence preparation, the trial at such a place cannot be considered as fair trial. Apart from exceptional circumstances, it would be convenient both to the prosecution and to the defence if the trial is conducted by a court within whose local jurisdiction the crime was committed. Trial at any other distant place would generally mean hardship to the parties in the production of evidence. These matters have been already discussed in Chapter 9.

13.6 Right of accused to know of the accusation

Fair trial requires that the accused person is given adequate opportunity to defend himself. Such opportunity will have little meaning, or such an opportunity will in substance be the very negation of it, if the accused is not informed of the accusations against him. The Code therefore provides in unambiguous terms that when an accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him.[23] In case of serious offences, the court is required to frame in writing a formal charge and then to read and explain the charge to the accused person.[24] Detailed provisions have been made in the Code in Sections 211 to 224 regarding the form of charge, and the joinder of charges. These matters have been discussed later in Chapter 15.

13.7 The accused person to be tried in his presence

The personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the

21. *Kebar Singh v. State*
22. ***See also***,
observations in
23. ***See,*** Ss. 228, 240, 246,
24. ***See,*** Ss. 228, 240, 246.

court. This would facilitate in the making of the preparations for his defence. A criminal trial in the absence of the accused is unthinkable. A trial and a decision behind the back of the accused person is not contemplated by the Code, though no specific provision to that effect is found therein. The requirement of the presence of the accused during his trial can be implied from the provisions which allow the court to dispense with the personal attendance of the accused person under certain circumstances.[25] For instance, a Magistrate issuing summons may dispense with the personal attendance of the accused and permit him to appear by his pleader under guidelines issued by the Supreme Court.[25 26 27] [S. 205] Similarly, Section 273 requires that the evidence is to be taken in the presence of the accused person; however the section allows the same to be taken in the presence of the accused's pleader if the personal attendance of the accused person is dispensed with.

Section 317 makes an exception to the above rule and empowers the court to dispense with the personal attendance of the accused person at his trial under certain circumstances. Section 317 reads as follows:

> 317. (1) At any stage of an inquiry or trial under this Code, if the judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.
>
> (2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

Provision for inquiries and trial being held in the absence of accused in certain cases

The general rule in criminal cases is that all inquiries and trials should be conducted in the presence of the accused, the underlying principle being that in a criminal trial the court should not proceed ex parte against the accused person. Although this rule is for the protection of the interests of the accused, this does not mean that the accused has a right to absent himself from court and that the court should necessarily grant his prayer for exemption from personal attendance.[2/] The court before dispensing with the personal attendance of the accused must be satisfied that 1) such attendance is not necessary in the interests of justice, or 2) that the accused persistently disturbs the proceedings in court. This power can be exercised only if the

25. *See supra,* para. 11.5.
26. See, *Keya Mukberjee* v. *Magma Leasing* Ltd{1008) 8 SCO 447: {2008} 3 SCC (Cri) 537; z008 Cri IJ 2597.
27. *H.R. industries* v. *State of Kerala,* 1973 Cri Lj 262, 263 (Ker).

is also required to record its reasons for such order. Regarding the exercise of the power under this section, it has been observed:

In cases which are grievous in nature involving moral turpitude, personal attendance is the rule. But in cases which are technical in nature, which do not involve moral turpitude and where the sentence is only fine, exemption should be the rule. The courts should insist upon the appearance of the accused only when it is in his interest to appear or when the court feels that his presence is necessary for effective disposal of the case. When the accused are women labourers, wage-earners and other busy men, courts should as a rule grant exemption from personal attendance. Courts should see that undue harassment is not caused to the accused appearing before them.[28]

The salutary provisions permitting the accused to appear by his pleader are there in the Code to help the accused and not to harass him, and the discretion the judge or Magistrate has in these matters is to be exercised judicially.[28] [29]

13.8

Evidence to be taken in presence of accused

As seen earlier, fair trial requires that the particulars of the offence have to be explained to the accused person and that the trial is to take place in his presence.[30] Therefore, as a logical corollary, such a trial should also require the evidence in the trial to be taken in the presence of the accused person. Section 273 attempts to achieve this purpose when it provides as follows:

273. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused,

Evidence to be taken in presence of accused

or, when his personal attendance is dispensed with, in the presence of his pleader.

[Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.][31]

Explanation.—In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Chapter VIII referred to in the explanation deals with security proceedings against any person for keeping the peace and for good behaviour.

The section makes it imperative that all the evidence must be taken in the

28. *Ibid, ±66.*
29. *N. Dinesan* v. *K.V.*
30. *See supra,* paras 13.6
31. *Ins.* by Criminal Law

the fact that no objection was taken by the accused is immaterial.[32] This rule is of course subject to certain exceptions made by the provisions of the Code, *viz*- Sections Z05, 293. 299, 317.

Though the imperative rule contained in the section confers a right on the accused to be present in the course of the trial, it presupposes that the accused accepts it and does not render its fulfilment an impossibility. This obligation or the right is not so absolute in character that its requirement cannot be dispensed with even in a case where the accused by his own conduct renders it impossible to comply with its requirements.

To interpret the section to cast an obligation as would require the evidence to be taken in the presence of the accused even where the accused by his own conduct makes recording of evidence in his presence an impossibility, is to sanction a right in favour of the accused to frustrate the trial at his own option. This would not only mean negation of a fair trial but would mean end of all trial at the choice of the accused. Such a position can never be considered to be consonant with basic principles underlying the Code.[33]

Therefore, if the accused is obstructing the smooth conduct of the trial the court may expel him after appropriate warning and proceed with the trial in his absence. However, the accused person should be able to reclaim his right to be present at the trial if he expresses bona fide willingness to conduct himself in such a manner as to allow the court to proceed 'with the trial smoothly in his presence.[34]

The right created by the section is further supplemented by Section 278. It, inter alia, provides that wherever the law requires the evidence of a witness to be read over to him after its completion, the reading *shall* be done in the presence of the accused, or of his pleader if the accused appears by pleader.

If any evidence is given in a language not understood by the accused person, the bare compliance with Section 273 will not serve its purpose unless the evidence is interpreted to the accused in a language understood by him. Therefore, provides as follows:

279. {1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

Inteipretation of evidence to accused or his pleader

32. ***Ra m***

33. ***Ctatev.Ananta*** Sipgh, 1972 Cri Lj 1327, 1332 (Cal).

34. *Ibid*, 1334.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Non-compliance with Section 279(1} will be considered as a mere irregularity not vitiating the trial if there was no prejudice or injustice caused to the accused person.[3i]>

If the accused is found incapable of understanding the proceedings by reason of unsoundness of mind, his case will be dealt with according to the provisions contained in Sections 328 to 339. These provisions have been considered separately in the next chapter.

An accused person, though not of unsound mind, may be deaf and dumb, may be foreigner not knowing the language of the country and no interpreter is available; and if such accused is unable to understand or cannot be made to understand the proceedings, there is a real difficulty in giving effect to Section 273 in its proper spirit. Section 318 attempts to deal with such cases. It says:

318. If the accused, though not of unsound mind, cannot be made to stand the proceedings, the Court may proceed with the inquiry or trial;

Procedure where under-
accttsed does not and,
understandproceedings in the case of a Court other than a High Court, if such proceedings result in

a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

In order to acquaint the accused further with the prosecution case and to facilitate his preparations for the defence, it is obligatory to supply him with copies of police report, statements before the police and other documents on which the prosecution wants to rely, or with a copy of the complaint, etc.

13.9 Right of accused person to cross-examine prosecution witnesses and to produce evidence in defence

Evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.[37]

The Supreme Court emphasised the need for cross-examination of the prosecution witnesses before framing charges. This is to be afforded to the accused so that he may plead for not charging him. He could seek for discharge. The Magistrate can discharge accused after recording reasons

35. *Shivanarayan Kabra* v. *State of Madras,* 1967 Cri LJ [9]6. *See supra,* Ss. 207, 208, 2.04(3), paras 11.7 and *I1.4.*
37. *Sukanraj* v. *State of Rajasthan,* 1967 Cri LJ 1702: AIR

even at the stage when the accused appears in response to summons or warrant but before taking prosecution evidence[38]

Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot by any standard be considered as just and fair. The refusal without any legal justification by a Magistrate to issue processes to the witnesses named by the accused person was held enough to vitiate the trial.[39]

Right of the accused person to have an expeditious trial justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and the trial is inordinately delayed. However, the Code does not in so many words confer any such right on the accused to have his case decided expeditiously. As seen earlier, if the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he *shall be released on bail.*[40] But this only mitigates the hardship of the accused person but does not give him speedy trial and secondly this rule is applicable only in case of proceedings before a Magistrate. The Code has given a more positive direction to courts when it says: 13.10

> In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. [S. 309(1)]

A criminal trial which drags on for unreasonably long time is not a fair trial. The court may drop proceedings on account of long delay even in a case where the delay w~as caused due to the mala fide moves of the accused. But in such a case the court may make the accused to suffer exemplary costs.[41] Section 309(1) gives directions to the courts with a view to have speedy trials and quick disposals. The right of the accused in this context has been recognised but the real problem is how to make it a reality in actual practice. Section 309(1) came to be amended in 2013 as follow's:

38. See,
A/o
39.

Habee
b
Moha

40. *See supra,* S. 437 (6), para. 12.3 *(d).*
41. *T.J. Stephen* v. *Parle Bottling* Co. *(P) Ltd.,* 198S Supp SCC 458:

Power to postpone or

309. In every inquiry or trial the proceeding shall be continued from day-to-
day until all the witnesses in attendance have been examined, unless the court
finds the adjournment of the same beyond the following day to be necessary
for reasons to be recorded.

Provided that when the inquiry or trial relates to an offence under Section 376, Section 376-A, Section-376-B, Section 376-C, or Section 376-D
of the Indian Penal Code {45 of i860}, the inquiry or trial shall, as far as pos-
sible be completed within a period of two months from the date of filing of
the charge sheet.[42] [43] [44] [45] [46]

It seems that this provision will help the courts to complete trials expeditiously.

The provisions with regard to limitation help the accused to certain extent.[43]

The right to speedy trial came to receive examination in the Supreme Court in *Moti Lai Sarafv. State of J&K*[44] [45] [46]. Dismissing a fresh complaint made after *2.6* years of an earlier complaint the Supreme Court explained the meaning and relevance of speedy trial right thus:

> The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impressible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted.

In *Hussainara Khatoon (4)* v. *State of Bihar*[6], the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an

42. ***Ins.*** by
43. *See* chapter on
44. (2006) 10
45. *Ibid.*
46. (1980) 1 SCC

taking positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial.[47] [48] [49] [50]

The spirit underlying these observations have been consistently rekindled by the Supreme Court in several cases.[48] [49] [50] This has again been expressed in *Raj Deo Sharma (2}* v. *State of Bihar*[49] wherein the court ordered to close the prosecution cases, if the trial had been delayed beyond a certain period in specified cases involving serious offences.

Though speedy trial right is held to be part of Article 21 of the Constitution, the courts after the decision in *P. Ramachandra Rao* v. *State of Karnataka*[30] gave effect to it depending upon the facts of each case.

13.11

Reasoned decisions

On the plainest requirement of justice and fair trial the least that is expected of the trial court is to notice, consider and discuss however briefly the evidence of various witnesses as well as the arguments addressed at the bar.[51] This requirement is also applicable to the decisions of the appellate courts.[52]

13.12

Doctrine of *"autrefois acquit"* and *"autrefois convict"*

According to this doctrine, if a person is tried and acquitted or convicted of an offence he cannot be tried again for the same offence or on the same facts for any other offence. This doctrine has been substantially incorporated in the Article 20(2} of the Constitution and is also embodied in Section 300 of the Code. When once a person has been convicted or acquitted of any offence by a competent court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment. Such a trial can be considered anything but fair, and therefore has been prohibited by the Code (and by the Constitution). The doctrine of *autrefois acquit* and *autrefois convict* which has been embodied in Section 300, will be discussed in detail subsequently

47. *Ibid, also see* discussions in *S. Gain* v. *Grindlays Bank Ltd.,* (1986} 1 SCO *654:* 1986 SCC (Cri) *64:* 1986 Cri Lj 255; *Madbesbwardbari Singh* v. *State of Bihar,* 1986 Cri LJ 1771 (Pat);
48. See, *Abdul Rehmah Antulay* v. *R.B. Naya*/c, (19 *92)* 1 SCC 225: T992 SCC (Cri) 93: 1992 Cri Lj 2717; *"Common Cause"* v. *Union of India,* (1996) 4 SCC 33: 1996 SCC (Cri) 589;
49. (1999) 7 SCC 604: 1999 SCC (Cri) 1324.
50. (2002) 4 SCC 578: 2002 SCC (Cri) 830: 2002 Cri LJ 2547.
51. *Mukhtiar Singh* v. *State of Punjab,* (1995) 1 SCC 760: T995 SCC (Cri)
52. *Ishvarbhai Puljibhai Patni* v. *State of Gujarat,* (1995) 1 SCC 178: 1995

13.13 All pervasive concept of fair trial

The concept of fair trial has permeated every nook and corner of the Criminal Procedure Code. This is what it should be. The major objective of the Code being to provide for fair trial in the administration of criminal justice, it is but natural that all the provisions of the Code are attuned to this goal.

> Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses or the cause which is being tried is eliminated.[53]

The Supreme Court has declared that the rights of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial.[54]

The present chapter has dealt with only the principal features of fair trial leaving other connected and ancillary matters for other chapters. This connection to other chapters with the concept of fair trial should not be overlooked.

53. *Zabira Habibullah Sheikh* (S) State of

54. *See,* discussions in

Chapter n

Trial Procedures: Courts and

Object and scope of the chapter 14.1

The principal features of a fair trial were considered in the preceding chapter. One important feature of such trial is the adoption of the adversary system. It is believed that on the whole the adversary system is a better device to discover the truth in a fair manner. In this system it is assumed that each party to the dispute, with a view to get a favourable decision, will strive its best to place before the tribunal its version and claims in the best possible manner. This process w'ould enable an impartial and competent tribunal to have a proper perspective of the case and to decide it with a degree of precision and fairness rarely attainable by any other process.

A criminal is punished because his crime is a wrong done more to the society than to the individual victim of the crime. Therefore in a criminal trial, the State representing the society comes before the court and accuses the suspected person of the commission of a crime. In the case of a noncognizable offence, the offence being in the nature of a private wrong[1] the aggrieved party or the complainant, and not the State, is the prosecutor. Even in such a case, it is submitted, the State, through its Public Prosecutor or Assistant Public Prosecutor, can step in and take charge of the prosecution. Therefore in a criminal trial the State through its prosecutor is one party to the proceedings; the other party is the accused who has been given a right to be defended by a counsel of his choice; and if he does not have sufficient means to engage a counsel for his defence, the

1. *See supra*, para. 4.3.

court has power to assign a pleader for his defence at the expense of the State under certain circumstances. The criminal trial based on the adversary system would therefore need three essential agencies: i) the court, 2) the prosecutor, and 3) the accused person defended by a counsel. The present chapter is divided into three parts and is intended to examine and study the three agencies separately.

A. The court

14.2 Courts to be independent and impartial

An independent and impartial judiciary is the bedrock on which the edifice of the administration of criminal justice is built. Our legal system has taken several steps to safeguard the independence of the judges and to ensure a very high degree of impartiality in the discharge of judicial functions.

(a) Separation of judiciary from the executive.—The directive principles of State policy require the State to take steps to separate the judiciary from the executive in the public services of the State.[2] The real purpose of this separation is to ensure the *independent* functioning of the judiciary freed of all suspicion of executive influence or control, direct or indirect.[3] In this context it may be mentioned that in some States District Judges are appointed Law Secretaries on deputation. They may sometimes be elevated to the Bench or reverted to their parent post. The question whether this practice runs counter to the spirit of Article 50 of the Constitution has not been raised. In a criminal trial the State being one of the two parties to the criminal proceedings, the separation naturally assumes special significance and importance. In the field of criminal law, the separation of the judiciary from the executive broadly means the administration of the criminal justice by members of the judiciary who are *independent of executive control.* This general principle involves two consequences: 1) that a judge or a Magistrate who tries a case must not be in any manner connected with the prosecution or interested in the prosecution, and 2) that he must not be in direct administrative subordination to anyone connected with the prosecution.[4]

The Code has substantially given effect to the constitutional directive. It provides for two categories of Magistrates—Executive Magistrates and Judicial Magistrates. The former are appointed by the State Government and are under the direct control of the State Government; the latter are appointed by the State Government after consultation with the High Court, but once they are appointed, they are fully under the administrative

2. Art. 50 of the
3. *See supra*, para.
4. 37th Report, p. 13,

and supervisory control of the High Court.[5] These matters have already been discussed in Chapter 2, *supra.*

Broadly speaking, the functions which are essentially judicial in nature have been entrusted by the Code to Judicial Magistrates, while functions which are "police" or administrative in nature have been given to Executive Magistrates. The Code however, empowers every State Government to direct, if so permitted by the Legislative Assembly of the State, that the functions to be discharged by the Executive Magistrates in certain cases shall instead be discharged by the Judicial Magistrates. Section 478 provides:

Power to alter functions allocated to Executive

> 478. If the Legislative Assembly of a State by a resolution so permits, the State Government may, after consultation with the High Court, by notification, direct that references in Sections 108, 109, no, 145 and 147 to an Executive Magistrate shall be construed as references to a Judicial Magistrate of the first class.

Section 108, 109 and no referred to above relate to preventive measures for taking security for good behaviour from certain persons. Sections 145 and 147 relate to preventive measures where disputes concerning land or water are likely to cause breach of peace.

[b) Court to be open,—Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in fairness, objectivity and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open court and must permit public admission to the court-room.[6] Section 327 reads as follows:

Court to *be open*

> 327. (1} The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:
>
> Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

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(2} Notwithstanding anything contained in sub-section (1) the inquiry into and trial of rape or an offence under Sections 376, 376-A, 376--B, 376-C or 376--D of the Indian Penal Code shall be conducted *in camera:*

Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.

(3} Where any proceedings are held under sub-section (2}, it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.[7]

While the main part of the section embodies the principle of public trial in open court the proviso recognises an exception to the principle. Cases may occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera.[8] Lack of space in the court-house may justify a judge or a Magistrate in admitting only a limited number of members of the public in the interests of public health and hygiene.[9] So too, when indecent and obscene matters have to be canvassed during a trial, judges and Magistrates in India may well have a discretion to exclude women, children and others likely to be injuriously affected by hearing that stuff.[10]

It has been observed that the language of Section 327 clearly presupposes the power in the presiding judge or Magistrate trying a criminal case to decide on the venue of trial.[11] The section has been interpreted to give discretion for the judge to hold his court in a suitable building, public or private, other than his court-house but unconnected with the parties to the proceedings, in case of emergency.[12] If the conveyance of prisoners and the accused to and fro the court-house or other buildings, will be attended with serious danger of attack, and the rescue of the accused or the prisoners, or with heavy cost to government in providing an armed escort, it may well be within the powers of the judge or Magistrate after due consideration of the public interests and after writing down the reasons in each case, to hold the trials even inside the jail premises, where the accused are confined, provided that the offences tried are not connected with those premises, and there is no apprehension therefore in the minds of the accused that they may not get a fair trial there.[13]

7. *Added* by
8. *Naresh Skridbar*
9. See,
10. M.R. *Yenkaiara*
11. T.R.
12. M.R.
13. *Ibid.* See also, *Kailash Nath*

The above interpretation of Section 327 regarding the discretion of the court as to the place of trial, is not quite free from doubt, particularly when it is considered in juxtaposition with other relevant specific provisions of the Code. Section 9(6} provides as under:

Court of Session

> 9. (6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

In the absence of any notification issued by the High Court under Section 9(6), it was held to be improper for the Sessions Court to conduct the trial in jail without the consent of the parties.[14] The High Court is competent to fix more than one place where the court of session will hold its sittings.[15] [16]

Similarly, according to Sections 11(1), and 16{1) the courts of Judicial Magistrates and Metropolitan Magistrates are established at such places as the State Government may specify after consultation with the High Court. However, there is no specific provision empowering the Magistrate to hold the sitting of his court at any other place for the general convenience of the parties after obtaining the consent of the prosecution and the defence as in Section 9(6) above.

How far the criminal court has discretion to decide as to the place of its sittings does not appear to be quite clear from the above discussion. An authoritative clarification in this regard would be useful. In any case, whichever may be the place of trial it must be reasonably accessible to the public and the trial must be generally held in open court.

In cases of rape and such other sexual offences, the undue publicity given to the court proceedings is evidently harmful to the unfortunate women victims of such crimes. Such publicity would mar their future in many ways, and may make their life miserable in society. In order to protect women against such publicity the court had always discretion to hold inquiries and trials in such cases *in camera.*[11] [16]

The second[17] proviso to Section 327(2) added in 2006 runs as follows:

Court to be open

> 327. Provided further that in camera trial shall be conducted as far as practicable by a woman judge or Magistrate.

14. *Vishesbwar Pathak* v. *State*, 1976 Cri Lj 52.1, 524
15. *Kan jit Singh* v. *Chief justice*, 1986 Cri Lj 632 (Del).
16. *State of Punjab* v. *Gurmii.* (1996) 2 SCC 384: 1996
17. *Ins.* by Act 5 of 2009 w.e.f. 31-12-2009.

This has been made obligatory that such inquiries and trials are to be held *in camera.* However, the court's discretion has not been completely taken

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away.

Sub-section (3) is just a corollary to sub-section (2) whereby the printing or publishing of any matter in relation to any such "in camera" proceedings has been prohibited except with the previous sanction of the court. A new proviso in the following terms has been enacted under Section $^{K}zy(^{K})$:[19]

327. Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties.

(c) Judge or Magistrate not to be personally interested in the case.—It is a primary principle of our law that no man shall be judge in his own case. The principle has been incorporated in Section 479 which reads as follows:

479. No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear, an appeal from any judgment or order passed or made by himself.

Explanation.—A Judge or Magistrate shall not be deemed to be a party to, or personally interested in, any case by reason only that he is concerned therein a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case.

Case in which Judge or Magistrate is personally interested

The essence of the section is that justice should be so administered as to satisfy a reasonable person that his tribunal was impartial and unbiased. It is well settled that every judicial officer who is called upon to try certain issues in judicial proceedings must be able to act judicially. He should be able to act impartially, objectively and without any bias. The question is not whether a bias has actually affected the judgment. The real test is whether there exists a circumstance according to which a litigant could reasonably apprehend that a bias attributable to a judicial officer must have operated against him in the final decision of the case. It is in this sense that it is often said that justice should not only be done but must also appear to be done.[20]

An analysis of the section would show that the Magistrate or judge is disqualified to act as such if:

(2) he is a party to or in the case before him; or *iii)* he is personally interested in the case. [IS ' ',

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This disqualification can be removed by obtaining the permission of the appellate court. The appellate court while granting permission will have to be very careful and cautious so as not to impinge upon fair trial.

The judge or Magistrate cannot hear an appeal from any judgment or order passed by him; and this disqualification cannot be removed by obtaining permission from higher appellate court.

The expression "personal interest" does not mean only private interest; it may well include official interest also. Further, it is not every interest that would disqualify under Section 479. In order to disqualify, the interest must be active and not passive. A mere formal grant of sanction which is necessary only for the purpose of fulfilling a technical statutory requirement may not amount to "personal interest" within the meaning of Section 479. In many such cases the sanction is given or refused for considerations which are extraneous to the merits of the case; on the other hand, if the interest consists of a direction to initiate criminal proceedings, the bar under Section 479 operates since the interest taken is active and is concerned with the merits of the case.[21 22 23]

A distinction may also be drawn between pecuniary interest and prejudice. The smallest pecuniary advantage is a bar to the justice acting.[22 23] But where the interest is not pecuniary, the question arises whether the interest is of such a substantial character as to make it likely that the judge or Magistrate has a real bias in the matter. What then has to be considered is the effect likely to be produced upon the minds of the public as to the fairness of the administration of justice and this is a question of degree to be decided in every case.[25]

Two more somewhat connected provisions may also be considered here. These are also aimed at keeping the judges and Magistrates away from any real or suspected bias.

1. Section 480 provides that "no pleader who practises in the court of any Magistrate shall sit as a Magistrate in that court or in any court within the local jurisdiction of the court". A lawyer cannot both practice law and also be in judicial service. He cannot possibly be appointed even as a Special Judicial Magistrate (honorary) in view of the essential requirements for being appointed as a Special Judicial Magistrate.[24] Section 480, though it incorporates a basic principle, it is submitted, is more or less superfluous in the context of the present set-up of our criminal courts.

21. *Rameshwar Bhartia* v. *State of Assam,* 1953 Cri Lj 163, 1.65: AIR
22. *Ibid;* see also, *AIoo Natbu v.*
23. *Shy am Singh* v. *State of*
24. *See supra,* Ss. 13 and 18, para. 2.11.

z, If the offences referred to in Section 195 are committed before a judge or a Magistrate, or in contempt of authority of such judge or Magistrate, the criminal proceedings in respect of any such offence can be initiated only on the complaint of such judge or Magistrate.[25] The judge or Magistrate initiating such a criminal proceeding will be deemed to have an active interest in the case, and therefore, on principle, is disqualified *to try* the case. Section 351 provides as follows:

Certain Judges and Magistrates not to try certain offences when committed before

352. Except as provided in Sections 344, 345, 349 and 350, no Judge of a Criminal Court (other than a Judge of a High Court} or Magistrate shall try any person for any offence referred to in Section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

The section embodies the rule that a court which has instituted the proceedings should not dispose of the case itself. However, the section makes exception to this rule in respect of matters covered by Sections 344, 345, 349 and 350. These sections provide for *i)* summary procedure for trial for giving false evidence,[26] *ii)* procedure in certain cases of contempt, *Hi)* summary procedure for punishment of a person refusing to answer or produce document, and *iv)* summary procedure for non-attendance by a witness in obedience to summons. These exceptions have been found necessary to deal promptly and effectively with certain offences affecting administration of justice itself. No doubt the exceptions, in a way, impinge upon the concept of fair trial, however, they are relatively more important for serving the larger interests of justice.

The restriction imposed by the section is in respect of "trying" a person for any of the specified offences. A question may arise whether the restriction will extend to cover hearing of an appeal in such a case. If the object of the section is that the same person should not be allowed to decide a matter which he may have already prejudged, there is no reason why the prohibition intended by the section should not cover the hearing of appeal in such cases.[27]

(d) Transfer of case to secure impartial trial.—(1) As observed earlier, a Magistrate empowered to take cognizance of an offence may do so upon his *own knowledge* about the commission of any such offence.[28] However, In such a case the accused must be told before any evidence is taken that he is entitled to have the case tried by another court and if he

25. *See supra*, S. 195, para. 10.5.
26. See, *Mahila Vinod Kumari* v. *State ofM.P.*, (2008) 8 SCC 34: (2008) 3 SCC (Cri) 414: 2008 Cri Lj 3867.
27. *Madhub Chunder Mazumdar* v. *Novodeep Chunder Pandit*, ILR (1S88} *16* Cal 121, 123; *Krishnappa* v. *Emperor*, (1924} 25 Cri LJ 713,
28. *See supra*, S. i90(i)(c), para. 10.1.

so chooses the case shall be transferred to another Magistrate.[29] This is in order to inspire confidence as to the impartiality of the court in conducting the trial.

(2) Whenever it is made to appear to the High Court that a *fair and impartial inquiry or trial cannot be held in any criminal court subordinate thereto,* it may, subject to the conditions laid down in Section 407, order *i)* that any offence be inquired into or tried by any other competent court; or *ii)* that any particular case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction, etc. [S. 407(1)]

In a transfer petition under Section 407 apprehension of not getting a fair and impartial trial is required to be reasonable and not imaginary based on conjectures and surmises.[30]

Of course it is not every apprehension of this sort that should be taken into consideration; but where the apprehension is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the fact of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer...[31] [32]

It is of the utmost importance that litigants should have faith and confidence in the impartiality of the courts. This confidence has to be maintained at all events. It is not enough to do justice. It must be seen to be done.[32] [33]

(3) Whenever it is made to appear to the Supreme Court that *a transfer of a case is expedient for the ends of justice,* it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court

[S. 406(1)].[33]

The Supreme Court shall exercise the power to transfer a case if the party interested shows that there are circumstances indicating reasonable apprehensions that fair justice may not be possible in a court dealing with a case or appeal.[34] It may, however, be noted that the central criterion for directing a transfer is not the hypersensitivity or relative convenience of a party. Something more substantial, more compelling, more

29. *See supra*, S. 191, para. 10,3.
30. *Satish Jaggi* v. *State of Cbbatisgarb,* (2.007} [z] Crimes
31. *Du peyr*
32. *A*
33. S
34. *Gurc hara*

imperilling from the point of view of public justice is necessary for directing a transfer.[35]

In an unusual case *viz. Zahira Hahihulla H. Sheikh* v. *State of Gujarat,* the Supreme Court ruled that it can order transfer even without the request of a party if it is convinced that such a step is necessary in the interests of justice. In fact in this case both the State and a material witness approached the Supreme Court seeking retrial as the trial was not conducted properly due to the witness's turning hostile and non-cooperation of the Public Prosecutor. The Supreme Court not only ordered retrial but also transferred the case to the State of Maharashtra. Though none of the parties had sought for transfer the Supreme Court transferred the case to Maharashtra in the interests of justice. The court declared that there was no need for formal application seeking transfer but can be ordered on the basis of relief specified or ancillary to main relief, the role played by the National Human Rights Commission was also adverted by the Supreme Court.[36]

The Supreme Court has also ruled that a political opponent could be a party interested under Section 406(2) on the ground that these opponents are the watchdogs of the government in power.[37]

(4) Whenever it is made to appear to a Sessions Judge that *a transfer of a case would be expedient for the ends of justice,* he may order that any particular case be transferred from one criminal court to another criminal court in his sessions division. [S. 408(1)] Under Section 408, however, the Sessions Court has no power to direct committal of a case to the Sessions Court. Nor can it order transfer of a case from one criminal court to another of superior jurisdiction.[38] The Sessions Court also cannot order transfer after the trial has started.[39]

It has been held that Sessions Judge is empowered under Section 408(1) to transfer a part-heard case from an Additional Sessions Judge to another

35. *Maneka Sanjay Gandhi* v. *Rani jethm*

36. *See,* discussions

37. *K.*

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competent court within his Sessions Division if it is in the interest of justice and the limitations imposed under Section 409 are not applicable.[40]

The general provisions regarding transfer of cases mentioned in {2), (3} and {4) above can very well be used as a means for securing a fair and impartial trial. The provisions regarding transfer of cases have been discussed later in greater detail in Chapter 26, *infra.*

Courts to be competent

14.3

{a) Hierarchy of courts and their powers to try offences.—The various classes of criminal courts have already been considered in Chapter 2, *supra.* An overview of the relevant provisions will show the hierarchy of criminal courts.[41] The hierarchy is desirable and necessary for proper marshalling of the limited resources available for the administration of criminal justice. Complicated cases of heinous offences would attract severe punishments and therefore these cases should be handled with great care by better qualified and experienced judges. On the other hand, in case of petty offences inviting only light punishments, it may be more expedient to have quick trials and speedy disposals and such cases can be safely handled by the subordinate judiciary. Section 26 mentions the courts by which the different offences are triable. The section reads as follows:

26. Subject to the other provisions of this Code,—

Courts by which offences are

{a) any offence under the Indian Penal Code {45 of i860) may be tried by—

(i) the High Court, or

{ii) the Court of Session, or

{Hi) any other Court by which such offence is shown in the First Schedule to be triable.

Provided that any offence under Sections 376, 376-A, 376-B, 376-C, 376-D or 376-E of the Indian Penal Code (45 of i860) shall be tried as far as practicable by a Court presided over by a woman.[42]

(6) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by—

(/} the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable.

It will be interesting to note that according to the First Schedule many offences punishable with imprisonment for terms exceeding three years are

40. See, *Jamuna Devi* v. *Distl. Sessions Judge, Tinsukia,* (2.007) "

41. *See supra,* Table 2, p. 17.

42. *Ins.* by Act 5 of 2009 and amended by the Criminal Law

triable by ***any*** Magistrate.[45] However, as seen earlier,[43 44] the court of a Magistrate of the first class may pass a sentence of imprisonment for a term ***not exceeding three years,*** and the court of a Magistrate of the second class may pass a sentence of imprisonment for a term ***not exceeding one year.***

Here, while making these apparently inconsistent provisions the Code has in fact adopted a pragmatic approach. Because, though the maximum punishments provided for the offences triable by Magistrates are beyond the limits to which such Magistrates can pass sentences, in most of the cases the highest penalty provided for the offence is not the appropriate sentence to be awarded for the offence. Experience has shown that the Magistrates are able to pass adequate sentences in respect of most of such offences. This means, the trial work in respect of such offences which would otherwise have gone to the Sessions Court is conveniently disposed of at a lower level and thereby the burden of the Sessions Court is considerably reduced.

The Code, however, has taken care to make provisions for such cases where the Magistrate considers that the sentence he is authorised to pass may not be appropriate or adequate.

(i) Section 325 provides as follows:

325. (i) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

Procedure when Magistrate cannot pass sentence sufficiently severe

(2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under sub-section (1), in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief judicial Magistrate.

{3} The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

43. **For instance, in case of offences triable by *any* Magistrate see,**
Ss. 325, 3S0, 381, 452. IPO, in case of offences triable by a Magistrate of the first class *see,* Ss. 134, 153-A, 153-8, 193, 211-214, 216, 216-A, 219-222, 225, 231, 239, 243-245, 247, 249, 250, 253, 256, 260, 281, 312, 317, 326, 327, 330, 335, 363, *363-A,* 365, 369, 370 377> 3*2 3^{S6,} 394> 4^{01}> 4°4> 4°7> 4°9> 4^{2o}> 4^{2}9> 433> 435> 440 454> 455> 457> 45^{8,} 4^{66,} 4^{68,} 47^{2-}477^{-A}> 493~497> 5^{o6}**; offences against other laws *(i.e,* other than the Penal Code)**
44. **See *supra,* S. 29, para. 2.16 and Table 3,**

The Chief judicial Magistrate has higher powers of sentencing[45] and it would be useful if cases tried by Magistrates could be sent to him for punishment, where the circumstances demand the imposition of a sentence higher than what the Magistrate can impose. However, the Magistrate can resort to Section 32.5 only "after hearing the evidence for the prosecution and the accused" and after forming the opinion that the accused is guilty. It is not open to the Magistrate to invoke Section 325 at any earlier stage.[46]

{2) When the accused person is previously convicted of certain serious offences and is being tried again by a Magistrate for any subsequent similar offence, the situation would probably demand (on conviction of the accused) the imposition of a sentence higher than what the trying Magistrate can impose. Section 324 makes a specific provision to cover such cases. The section is as follows:

Trial of persons previously convicted of offences against

324. (1) Where a person, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code (45 of i860} with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, and the Magistrate before whom the case is pending is satisfied that there is ground for presuming that such person has committed the offence, he shall be sent for trial to the Chief Judicial Magistrate or committed to the Court of Session, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted.

(2) When any person is sent for trial to the Chief Judicial Magistrate or committed to the Court of Session under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly sent or committed, unless the Magistrate discharges such other person under Section 239 or Section 245, as the case may be.

While offences punishable under Chapter XII, Penal Code, i860 (IPC) relate to coins and government stamps, offences punishable under Chapter XVII IPC relate to those against property like theft, extortion, cheating, etc. This section would be useful for proper implementation of Section 75 IPC which provides enhanced punishment to previously convicted persons committing subsequently certain offences under the above mentioned chapters of the IPC.

It may be noted that the section is applicable when the case is pending and it does not require, as in Section 325 that the entire evidence for the prosecution and defence should have been heard. Further, the Magistrate can either send the accused person for trial to the Chief Judicial Magistrate or if in his opinion the Chief judicial Magistrate will not be able to pass adequate sentence demanded by the gravity of the offence, he may commit

45. *See supra.* S. 29, para. *z.i6* and Table 3.
46. *State* v. *Rajkumar Satthi*, 19So Cri LJ 1355, 1357

the accused person to the Court of Session. However, even though both these alternatives are legally available to the Magistrate, it is generally expedient if the Magistrate, on forming the opinion that he himself would not be able to pass an adequate sentence, forwards the case to the Chief judicial Magistrate who has the power to impose a sentence extending up to seven years' imprisonment and leaving the question of committal to be considered, if necessary, by the Chief Judicial Magistrate himself.[47]

{3} If at any stage of the trial before a Magistrate, the Magistrate considers it appropriate that the case should be tried by a Court of Session, Section 323 empowers the Magistrate to commit the case to the Court of Session. Section 323 is as follows:

> 323. If, in any Inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of Chapter XVIII shall apply to the commitment so made.

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed

In a case instituted on a police report or otherwise, if it appears to the Magistrate that the offence is exclusively triable by the Court of Session, then he is required by Section 209[48] to commit the case to the Court of Session. In a case apparently triable by a Magistrate if it is found during the course of taking evidence that the offence disclosed by such evidence is one exclusively triable by a Court of Session, the Magistrate would necessarily commit the case under Section 323. However even in cases where the offence is not exclusively triable by a Court of Session, the Magistrate may, in an appropriate case, invoke Section 323 and commit the case to the Court of Session.[49] The words "if it appears to him" in the section contemplate the formulation of a judicial opinion. Though the discretion to commit is wide under the section, it has to be exercised judicially and no hard and fast rule can be enunciated as to in what cases committal should be made under this section and in what other cases it should not be made.[50] In view of Section 325 it has been suggested that Section 323 should be resorted to only when the Magistrate opines that the case ought to be tried by a Court of Session for reasons other than the inability of the Magistrate to award adequate sentence.[51]

{4} If at any time during the course of the trial, the Magistrate finds that his court had no local jurisdiction to try the case,[52] or that considering

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the nature of the offence he was not competent to try the case,[53] *or that he would not be able to pass adequate sentence on the accused,*[54] or that he was personally interested in the case,[55] or there were other difficulties affecting his competence to try the case, he may submit a report indicating reasons,[56] to the Chief Judicial Magistrate explaining the circumstances and submit the case to him for proper disposal. This is the effect of Section 322 which runs as follows:

Procedure in cases which Magistrate cannot dispose

322. (1) If, in the course of any inquiry into an offence or a trial before a Magistrate in any district, the evidence appears to him to warrant a presumption—

{a} that he has no jurisdiction to try the case or commit it for trial; or *{b)* that the case is one which should be tried or committed for trial by some other Magistrate in the district; or (c) that the case should be tried by the Chief judicial Magistrate, he shall stay the proceedings and submit the case, with a brief report explaining its nature, to the Chief Judicial Magistrate or to such other Magistrate, having jurisdiction, as the Chief judicial Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

In case the Magistrate has initially no jurisdiction or is not competent to take cognizance of the offence, Section 322 will not be attracted and in such a case the only course open will be to return the complaint under Section 201 to the complainant for presentation to the proper court.[57]

(b) Competence of the court to try juvenile offenders.—Juvenile offenders, or juvenile delinquents, are not *criminals* and therefore their cases should be handled with great care and understanding by experienced and qualified judges. Earlier State Children Acts used to confer jurisdiction on the children's courts for trying juvenile offenders. In order to ensure trial of such persons in a situation where the State law does not have provision for it the Code makes provision in Section 27 which enacts:

Jurisdiction in the

27. Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the Court is under the age of sixteen years, may be tried by the Court of a Chief judicial Magistrate, or by any Court specially empowered under the Children Act, i960 (60 of i960}, or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

The special provision made by this section for the trial of a juvenile offender is on the face of it applicable only in respect of offences not

53. ***See, S. z6*** and First Schedule Column 6.
54. ***See supra,*** Ss. 28-29, para, ***z.i6,*** Table 3.
55. ***See supra,*** S. 479, para. 14.2(f).
56. *Shankar Nlalharrao Deshmukh* v. *State of Maharashtra,* 1997 Cri LJ
57. *Rakesh v. State of Rajasthan*, 1987 Cri Lj 1342 (Raj).

punishable with death or imprisonment for life. The Juvenile Justice (Care and Protection of Children) Act, 2000[58] [59] gives exclusive jurisdiction to children's courts while dealing with juvenile accused in respect of all offences and prescribe special procedure in the inquiry and trial of such cases. Section 27 is only an enabling provision and as such it cannot be said to be specific provision to the contrary within the meaning of Section 5 in relation to such Acts. Therefore it has been held that this section does not affect the provisions of any State or Central Act.[39]

(c) Qualification of judges and Magistrates.—For the effective functioning of the criminal courts it is important that the judges and Magistrates be persons having adequate qualifications, ability and wisdom. While the Code has specially prescribed the qualifications necessary for being appointed as a Public Prosecutor or an Assistant Public Prosecutor,[58] [59] [60] no such attempt has been made in the Code to prescribe the qualifications for a judge or a Magistrate. Some rudimentary requirements in case of Special Magistrates have been prescribed in Sections 13 and 18, but much is left to be specified by the rules to be formulated by the High Court in this behalf.

It may, however, be safely mentioned that all reasonable efforts on the part of the State Government and the High Court are made to man the judiciary with persons of integrity, honesty and character and also having sound knowledge of law.

B. The Prosecutor

14.4 The Prosecution set-up

The prosecution set-up envisaged by the Code consists of Public Prosecutors (including Additional Public Prosecutors and Special Public Prosecutors), and Assistant Public Prosecutors. While the former are to conduct prosecutions and other criminal proceedings on behalf of the State in the Courts of Session and the High Courts, the latter are to conduct prosecutions on behalf of the State in the courts of Magistrate.[61] Provisions regarding the qualifications and appointments of Public Prosecutors and Assistant Public Prosecutors are contained in Sections 24

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59. ***Ra gh bir v.***

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and 25 and have been earlier discussed in Chapter 3.[62] The basic principles regarding their roles have also been discussed.[63] Therefore these matters need not be repeated here.

It may, however, be seen that while Section 225 specifically provides that "in every trial before a court of session the prosecution shall be conducted by a Public Prosecutor", no such specific provision has been made by the Code in respect of the trials in the courts of the Magistrates. According to the existing practice, however, the State arranges for the conduct of the prosecution in all cases initiated on a police report; and usually it is for the Assistant Public Prosecutors to conduct such prosecutions on behalf of the State. In cases initiated on a private complaint, the prosecution is either conducted by the complainant himself or by his duly authorised counsel. The amendments to the Code effected in 2005 envisage the states to establish Directorate of Prosecution consisting of a Director of Prosecutions and Deputy Directors of Prosecution. Advocates having 10 years' practice could be appointed Directors/Deputv Directors. They would function under the Home Department.

Director shall be in charge of the Directorate. All the prosecutors working at the High Court would work directly under the Director. The prosecutors including Special Prosecutors functioning in the District Courts and Assistant Public Prosecutors would work under the Deputy Director who in turn would be subordinate to the Director. The powers and functions of the Director including the territorial jurisdiction of the Deputy Directors may be specified by the State Government by Notification. It is pertinent to note that the Director and Deputy Directors are appointed with the concurrence of the Chief justice.

The scheme is a departure from the set-up originally envisaged under the Code of 1973. This will encourage active coordination and cooperation between the police and the prosecution though theoretically speaking it may give the impression of making the independence of the Public Prosecutor suspicious. These provisions are not applicable to the Advocate General when he acts as Public Prosecutor.[64]

Appearance by Prosecutors

14.5

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal. [S. 301(1)]

If in any such case any private person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the

62. ***See supra***, paras 3.5, 3.6, 3.7 and 3.8.
63. ***See supra,*** para. 3.9.
64. Criminal Procedure Code (Amendment) Act,

pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the court, submit written arguments after the evidence is closed in the case. [S. 301(2)]

The court is unconcerned in the matter of engagement of a pleader by a private party and of the conduct of the trial by such pleader under the direction of the Public Prosecutor. The permission of the court will, however, be necessary where the pleader engaged by the private party desires to submit written arguments after the conclusion of the trial.[63]

14.6 Others not to conduct prosecution without permission

Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person. If such person is a police officer no such permission to conduct the prosecution shall however be granted unless such officer satisfies two conditions, namely,

1. that he has not taken any part in the investigation into the offence with respect to which the accused is being prosecuted; and
2. that he is not an officer below the rank of Inspector. [S. 302(1)]

The restriction on allowing the police to be in charge of prosecution is understandable. Generally speaking, the police officers of the lower grade lack adequate knowledge of law, particularly of case law and the law of evidence, and they are not capable of presenting their cases with ability and effectiveness. Further it will be pertinent to take note of the observations of the Law Commission when it said:

> It must not also be forgotten that a police officer is generally one-sided in his approach. It is no reflection upon him to say so. The Police Department is charged with the duty of the maintenance of law and order and the responsibility for the prevention and detection of offences. It is naturally anxious to secure convictions... It is obvious that by the very fact of their being members of the police force and the nature of the duties they have to discharge in bringing the case to court it is not possible for them to exhibit that degree of detachment which is necessary in a Prosecutor.[65 66]

Section 302(1) further provides that the Advocate-General, or government advocate or a Public Prosecutor or Assistant Public Prosecutor shall have a right to conduct a prosecution, and that in such a case no permission of the Magistrate for conducting the prosecution would be necessary. The effect of this provision is that the Public Prosecutor or the Assistant Public Prosecutor can intervene and assume the charge of the prosecution even in a case initiated on a private complaint. In that case, the pleader [65 66]

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appearing on behalf of the complainant shall have to act under the directions of the Prosecutor.[67]

Sub-section (2) of Section 302 provides that any person conducting the prosecution may do so personally or by a pleader.

C. The accused person

Accused person may be natural person or a body corporate

14.7

According to Section 11 IPC the word "person" *includes* any company or association or body of persons whether incorporated or not. Similarly Section 3(42) of the General Clauses Act, 1897 provides that "person" shall include any company or association or body of individuals, whether incorporated or not. While the context of most of the provisions of the IPC referring to a person being punishable for doing or failing to do a specific thing, would normally exclude their application to a body of individuals, there is no doubt that a company or association can be prosecuted for certain offences under the IPC and other laws which are punishable with fine. Certain special laws specifically provide for the application of the penal provisions contained in them to companies and associations.[68]

Fair trial requires that the accused persons should be tried in his presence,[69] that the evidence in the trial is to be taken in the presence of the accused,[70] and the accused person should be made to know the accusations against him.[71] [72] [73] Questions may arise as to how these requirements can be satisfied when the accused person is a company or any association. Section 63 provides specifically how service of summons on corporate bodies and societies, can be effected.[72] [73] But other questions may arise as to how the corporation is to appear in court through a representative, how the person who may come forward as a representative of the corporation is to be recognised as such by the court, what will happen if after due service no one appears in court as the authorised representative of the corporation, *etc.*[75] Most of the difficulties will be met by the provisions of Section 305 which reads as follows:

> 305. (1) In this section, "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, i860 {21 of i860}.
>
> *Procedure when corporation or registered society is an accused*
>
> (2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose

67. ***See su***
68. 41st Report, p. 188, paras 24.1 and 24.2.
69. ***See supra,*** para. 3:5.7.
70. ***See supra,*** S. 273, para. 13.8.
71. ***See supra,*** para. 13.6.
72. ***See supra,*** para. 5.3(h).
73. ***See,*** 41st Report, pp. 188-89, para- 24.3.

of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shah be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section {3) shall not apply.

(5) Where a statement in writing purporting to be signed by the Managing Director of the corporation or by any person {by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

It may be interesting to note here the decision of the Supreme Court regarding the criminal liability of the State. The court has held that the State like any other individual is to be held criminally liable under a statute, unless the statute either expressly or by necessary implication, exempts the State from such liability.[74]

14.8 Accused person of unsound mind at the time of inquiry or trial

If the accused person by reason of unsoundness of mind is incapable of understanding the proceedings and of making his defence the rights created in favour of the normal accused person[75] will be of little avail to him. The Code has therefore made special provisions in favour of such accused person with unsound mind in order to give him a fair deal. These provisions are contained in Sections 328 to 332 and 337 to 339.

Section 328 as amended reads:

328. {1} When a Magistrate holding an inquiry has reason to believe that

Procedure in case of the *accused being lunatic* conse

person against whom the inquiry is being held is of unsound mind and

quently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such

(i-A) If the civil surgeon finds the accused to be of unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation:

Provided that if the accused is aggrieved by the information given by the psychiatrist or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of—

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college;[76 77]

(2) Pending such examination and inquiry, the Magistrate may deal

with such person in accordance with the provisions of Section 330.

[77][(3) If such Magistrate is informed that the person referred to in sub-section (i-A) is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of defence and if the accused is found so incapable, the Magistrate shall record a finding to that effect, and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if he finds that no prima fade case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with him in the manner provided under Section 330.

Provided that if the Magistrate finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused, and order the accused to be dealt with as provided under Section 330.

(4) If such Magistrate is informed that the person referred to in sub-section {i-A} is a person with mental retardation, the Magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence, and if the accused is found so incapable, the Magistrate shall under closure of the inquiry and deal with the accused in the manner provided under Section 330.]

The section lays down the procedure which a Magistrate is enjoined upon to follow when an accused person alleges that he is suffering from such mental infirmity as to render him incapable of making his defence. The unsoundness of mind dealt with in this section is the one which such an accused person alleges to be suffering from at the time of the inquiry before the Magistrate and not one at the time of the incident during which he is said to have committed the offence in question.[78 79 76 77 78 79]

76. ***his.*** by Act 5 of 2.009 (w.e.f. 31-12-2009).

77. ***Subs,*** for sub-section (3} by Act 5 of 2009, S. 25

78. ***Jai Shanker*** v. ***State of H.P.,*** {1973) 3 SCC 83: [1]973 SCC (Cri) [1]45:

79. ***Ibid,*** 1530.

Procedure in case of person of unsound mind tried before Court

329. (1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

[80][{i-A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or court whether the accused is suffering from unsoundness of mind:

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of—

{a) head of psychiatry unit in the nearest government hospital; and

[b) a faculty member in psychiatry in the nearest medical college.]

[81][(a) If such Magistrate or Court is informed that the person referred to in sub-section (i-A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall,

80. ***Ins.*** by Act 5 of 2,009, S. *2.6* (w.e.f. 51-12.-2009}.
8'i. ***Subs,*** for sub-section (2} by Act 5 of 2009, S. 26{w.e.f. 31-12-2009}.
S2. ***State of Maharashtra*** v. ***Sindhi,*** {197;} 1 SCC 647: 1975 SCC (Cri) 283, 288: 1975 Cri Lj *475-

till an executable sentence is passed by the competent court. Viewed from that standpoint, the confirmation proceedings under Sections 3 *66,* 367 and 368, Chapter XXVIII of the Code are in substance a continuation of the trial.[83] In case of appeals it has been observed that when the report is that an accused appellant is of unsound mind, it is reasonable to infer that he is incapable of making his defence. The court in the circumstance is bound to afford him the same protection to which he would be entitled had he been of unsound mind at the time of the trial.[84]

The word "appears" in Section 329 imports a lesser degree of probability than "proof", but this does not mean that whenever a counsel raises such a point before a Sessions Judge he has to straightaway hold an elaborate inquiry into the matter. Of course if he has any serious doubt in the matter the Sessions judge should hold a proper inquiry.[85] The provisions of Section 329 are mandatory and an omission to decide the preliminary- issue shall vitiate the whole trial.[86] [87]

Release of person of unsound mind pendhig investigation or trial

[87][33°. (1) Whenever a person if found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be shall, whether the case is one in which bail may be taken or not, order release of such person on bail:

Provided that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.

(2) If the case is one in which, in the opinion of the Magistrate or Court, as the case may be, bail cannot be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Mental Health Act, 1987 {14 of 1987).

(3) Whenever a person is found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the

r19Ina19, 19f 2cc1,19n,d b„ .—d„19d.[83] [84] [85] [86] [87]

83. ***Ibid,*** 1478.

84. ***Vivian Rodrick*** v. ***State ofW.B.,*** (1969} 3 SCC 176, 186:

85. ***LV.***
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87. ***Subs,*** by Act 5 of 2009, S. 27 (w.e.f. 31-12-2009).

Provided that—

(a) if on the basis of medical opinion or opinion of a specialist, the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under Section 328 or Section 329, such release may be ordered, if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person;

(b) if the Magistrate or Court, as the case may be, is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training.]

Resumption of inquiry or trial

331. (1) Whenever an inquiry or a trial is postponed under Section 328 or Section 329, the Magistrate or Court, as the case may be, may at any time after the person concerned has ceased to be of unsound mind, resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

{2) When the accused has been released under Section 330, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

Procedure on accused appearing before Magistrate or Court

332. (i) If, when the accused appears or is again brought before the Magistrate or Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the Inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall act according to the provisions of Section 328 or Section 329, as the case may be, and if the accused is found to be of unsound mind and consequently incapable of making his defence, shall deal with such accused in accordance with the provisions of Section 330.

Sections 336 to 339 are also relevant sections and are given below:

Power of State Government to empower officer in charge to discharge

336. The State Government may empower the officer in charge of the jail in which a person is confined under the provisions of Section 330 or Section 335 to discharge all or any of the functions of the Inspector-General of Prisons under Section 337 or Section 338.

Procedure where lunatic prisoner is reported capable of making his defence

337. If such person is detained under the provisions of sub-section {2} of Section 330, and in the case of a person detained in a jail, the Inspector- General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 332; and the certificate of such Inspector- General or visitors as aforesaid shall be receivable as evidence.

Procedure where lunatic detained is declared fit to be released

338. (1) If such person is detained under the provisions of sub-section (2) of Section 330, or Section 335, and such Inspector-General or visitors shall certify that, in his or their judgm ent, he may be released without danger

doing injury to himself or to any other person, the State Government may thereupon order him to be released, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical ofhcers.

(2) Such Commission shall make a formal inquiry into the state of mind of such person, take such evidence as is necessary, and shall report to the State Government, which may order his release or detention as it thinks fit.

Delivery of lunatic to care of relative or friend

339. (1) Whenever any relative or friend of any person detained under the provisions of Section 330 or Section 335 desires that he shall be delivered to his care and custody, the State Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such State Government, that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct;

(c) in the case of a person detained under sub-section (2) of Section 330, be produced when required before such Magistrate or Court, order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence, the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in clause (6) of subsection (1), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production the Magistrate or Court shall proceed in accordance with the provisions of Section 332, and the certificate of the inspecting officer shall be receivable as evidence.

14.9

14.10

Section 335 referred to in the above Sections 336 to 339 deals with detention in safe custody of persons acquitted on grounds of unsoundness of mind.

Section 335 along with Sections 333 and 334 will be discussed later

legal practitioner of his choice. The right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognised because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor. This has been eloquently expressed by the US Supreme Court in *Powell* v. *Alabama*[88]. The court observed:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence, e^A en though he had a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does nor know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[88 89]

The Code has specifically recognised the right of a person against whom proceedings are instituted to be defended by a counsel. According to Section 303, "any person accused of an offence before a criminal court, or against whom proceedings are instituted, may of right be defended by a pleader of his choice".

This section certainly contemplates that the accused should not only be at liberty to be defended by a pleader at the time the proceedings are actually going on, but also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purpose of his defence.[88 89 90] The right to consult a lawyer for the purposes of defence begins from the time of arrest of the accused person.[91]

The accused must therefore get reasonable opportunity to communicate with his lawyer when in police custody. The consultations can be within the presence of the police but it would be unreasonable and unjust to have them within the hearing of the police.[92] It may be pertinent to

88. 77 L Ed 158: 2,87 US 45 (1932).
89. ***Ibid***, 6S-69.
90. Llewelyn Evans, re, (192.6) 27 Cri Lj 1169: AIR 192.6 Bom 552, 552; see also, ***Kailash Nath Agarwal*** v.
91. ***Moti Bai*** v. ***State,*** (1954) 55 Cri Lj 1591: AIR 1954 Raj 241, 243; see also, ***Llewelyn Evans, re,*** {1926) 27 Cri Lj 1169: AIR 1926 Bom 551, 552 and
92. ***Amolak Ram*** v. ***Emperor,*** (1931) 3 - Cri LJ

mention here that distinguishing *Nandini Satpathy* [123], the Supreme Court in *Jugal Kisbore Samra*[1] ruled that the advocate of the accused could be permitted to watch the interrogation of the accused by the police. He could be in a separate chamber. The court relied on *D.K. Basu* v. *State of W.BH* rather than *Nandini Satpathy* for enunciating this rule. According to Section 126, Evidence Act, 1872, the communications between the accused and his lawyer under the circumstances are privileged and confidential.

This section does not confer a right on the accused person to be provided with a lawyer by the State or by the police or the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer, if he wants to engage one, or to engage one himself, or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity.[4] The next section, however, directs the Court of Session to assign a lawyer for his defence under certain circumstances. The Sessions Judge cannot thrust a counsel of his choice on the accused and make that counsel defend the case against the will of the accused, particularly when the lawyer engaged by the accused was absent because of serious illness.[5] If the court refuses to hear the defence counsel, it is an illegality which might vitiate the trial.[6] The Supreme Court has observed that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.[7]

Legal aid at State expense

14.11

If the right to counsel is essential to fair trial, it is equally important to see that the accused has the necessary means to engage a lawyer for his defence. It does not need any profound understanding of the legal process to appreciate how an indigent accused in a criminal proceeding stands the risk of denial of a fair trial when he does not have equal access to the legal services available to the opposite side.[8] By the addition of Article 39-A[9] in

Emperor, (1931) 31 Cri LJ 339, 341: AIR 1930 Lah 945.

1. *Nandini Satpathy* v. *P.L. Dani,* (197S) 2 SCC 424: 1978 SCC (Cri) 236: 1978 Cri LJ 968.
2. *Directorate of Revenue Intelligence* v. *Jugal Kishore Samra,* (2011) 12 SCC 362: (2012) 1 SCC (Cri) 573.
3. {1997) 1 SCC 416: 1997 SCC (Cri) 92.
4. *Tara Singh v. State,* {1951) 52 Cri LJ 1491, 1493: AIR 1951 SC 441. See also, *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra,* (2012} 9 SCC 1: (2012) 3 SCC (Cri) 481: 2012 Cri LJ 4770.
5. *State of Karnataka* v. *Sidda,* 1975 Cri Lj 1159, ndi (Kant).
6. *Muthukaruppa Servai* v. *Emperor,* (1928) 29 Cri LJ 1082: AIR 1928 Mad 1234, 1235.
7. *Janardhan Reddy* v. *State of Hyderabad,* (1951) 52 Cri LJ 736, 740: AIR 1951 SC 217. See, *Mohd. Hussain* v. *State (Govt, of NCT of Delhi),* (2012) 2 SCC 584 : (2012) 1 SCC (Cri) 919: 2012 Cri LJ 1069.
8. Report of the Expert Committee on Legal Aid, {1973), p. 69, para. 1.
9. This Article was inserted in the Constitution by the Constitution (42nd Amendment) Act, 1976, S. 8.

the Constitution as one of the directive principles of State policy, it has now been recognised in unequivocal terms that it is the duty of the State to provide free legal aid in order to ensure that equal opportunities for securing justice are not denied to any citizen by reason of economic and other disabilities. Article 39-A is as follows—

> 39-A. *Equal justice and free legal aid.*—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

In *Hussainara Khatoon* (4) v. *State of Bihar*[10], the Supreme Court after adverting to the abovequoted Article 39-A of the Constitution and after approvingly referring to the creative interpretation of Article *zi* of the Constitution as propounded in its earlier epoch-making decision in *Maneka Gandhi* v. *Union of India*[11], has explicitly observed as follows:

> The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.[12 13]

In a later decision in *Khatri (z)\\ State of Bihar*[15] *{Khatri case),* the Supreme Court further clarified that the State cannot avoid its constitutional obligation to provide free legal services to indigent accused persons by pleading financial or administrative inability. According to the Supreme Court, the State is under a constitutional mandate, and whatever is necessary for this purpose of providing legal aid has to be done by the State.

In the *Khatri case,* the Supreme Court also held that the constitutional obligation to provide free legal services to indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. Because it is at that stage that he gets the first opportunity to apply for ball and obtain his release as also to resist remand to police or jail custody. That is the stage as also when he is remanded from time to time that an accused person would need competent legal advice and representation. [10 11 12 13]

10. (1980) I SCC 98: 1980 SCO {Cri) 40, 47: 1979 Cri
11. (197S) 1 SCC 248: AIR 1978 SC 597.
12. ***Hussainara Khatoon*** (4} v\ ***State of Bihar,*** (1980) 1 SCC 98, 105: 1980 SCC (Cri) 40, 45: 1979 Cri LJ 1045;
13. (1981} 1 SCC 627: 1981 SCC (Cri) 228: 1981 Cri LJ

Even this right to free legal services may prove to be illusory unless the Magistrate or the court before whom or before which the accused is produced, informs him of such right. Therefore the Supreme Court declared:

> We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State.[14]

If the right to free legal services is a constitutional fundamental right of an indigent accused person, it is not easy to understand how that right could be taken away only on the ground that the offence alleged against him is in the nature of social and economic offence. Despite this rather illogical stance, it must be acknowledged that during the last few years the Supreme Court has taken big strides in helping generally the indigent accused persons.

It has been categorically laid down by the Supreme Court that the constitutional right of legal aid cannot be denied even if the accused failed to apply for it. It is now therefore clear that unless refused, failure to provide legal aid to an indigent accused would vitiate the trial, entailing setting aside of conviction and sentence.[15]

It has been ruled by the Supreme Court in the *Ajmal Kasab case*[16] that it is obligatory for the Magistrate to tell the accused of his right to get free legal aid. In case he fails in this duty, though it may not vitiate the trial, disciplinary action may be initiated against him.

The Code has made provision to provide a lawyer to the indigent accused person in a trial before a Court of Session; the Code also enables

14. *Khatri (z)* v. *State*
15. *Suk Das* v. *UT of Aruna*
16. See, *Moh*

Legal aid to accused at State expense in certain cases

a State Government to extend this right to any class of trials before other courts in the State. Section 304 reads as follows:

> 304. (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
>
> (2.) The High Court may, with the previous approval of the State Government, make rules providing for—
>
> (<2) the mode of selecting pleaders for defence under sub-section (i);
>
> (b) the facilities to be allowed to such pleaders by the Courts;
>
> (c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

{3} The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (z), shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.

In the implementation of this section several problems are bound to arise. It is not easy to determine whether the accused is not having sufficient means to engage a pleader. The High Court is to frame rules in respect of matters referred to in sub-section (2) above. Selection of pleaders is another sensitive area. Legal aid to the indigent accused will be of little use if competent lawyers are not selected for the work. The observations of the Supreme Court in this context will indicate the high importance that should be attached to selecting the right type of lawyers to handle such cases. The court observed:

We find no reason to disagree with the finding of guilt and refuse special leave. Even so, we are disturbed, having a look at the proceedings in this case, that the Sessions Judges do not view with sufficient seriousness the need to appoint State Counsel for undefended accused in grave cases. Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available, so that the Advocate chosen may serve the cause of justice with all the ability at his command.[17]

The section is applicable in respect of "a trial before the Court of Session". If the accused is sentenced to death by the Sessions Court and a reference is made to the High Court for confirmation of the death sentence, will the indigent accused person be entitled to avail of this right to counsel at the State expense in the reference proceedings? If the indigent accused is

17. ***Ranchod Mathur Wasatva*** **v.** ***State of Gujarat,*** **(1974) 3 SCC 581: 1974 SCC (Cri) 59- 1974 Cri LJ 799-**

if the indigent accused wants to file an appeal against his conviction, will he get legal aid for this appeal?

These questions are now of academic importance only. Because the Supreme Court has now recognised that every indigent accused person has a fundamental constitutional right to get free legal services for his defence, and this recognition goes far beyond the length and breadth of Section 304 even if liberally interpreted. The provisions of Section 304 of the Code never comes in the way of right of accused to be defended by an advocate of his choice. The person who has been granted legal aid as per the provision of Section 304 of the Code can always on the later stage of the trial engage a counsel of his own choice.[18]

The Legal Services Authorities Act, 1986 has since been brought into force. This Act envisages establishment of machinery to afford legal aid to the indigent accused. It has been enacted in pursuance of Article 39-A of the Constitution. As is evident from the tenor of this provision judiciary being part of "State" under Article iz of the Constitution is envisaged to be an active participant in spreading legal literacy and in encouraging employing law as an instrument for achieving social justice. The Legal Services Authorities established at various levels envisage an active role for the judicial officers to make the dream of achieving equality coming true.[19]

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Chapter 15

Trial Procedures: Charge

Scope of the chapter 15.1

One bask requirement of a fair trial in criminal cases is to give precise information to the accused as to the accusation against him. This is vitally important to the accused in the preparation of his defence. In all trials under the Code the accused is informed of the accusation in the beginning itself. In case of serious offences the Code requires that the accusations are to be formulated and reduced to writing with great precision and clarity.

This "charge" is then to be read and explained to the accused person.[1]

Charge serves the purpose of notice or intimation to the accused, drawn up according to specific language of law, giving clear and unambiguous or precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial.[2] In a criminal trial the charge is the foundation of the accusation and every care must be taken to see that it is not only properly framed but evidence is only tendered with respect to matters put in the charge and not the other matters.[3] In framing a charge during a criminal trial, instituted upon a police report, the court is required to confine its attention to documents referred to under Section 173.[4] The judge needs to be only convinced that there is a prima facie case, where there is no necessity to adduce reasons for framing charges. Except in certain cases there is no necessity to hear the accused at this stage as a general rule. There is no need for the judge to adduce reasons for charging either.[5] However, the Magistrates is required to write an order showing

1. This procedure is followed in trials of warrant cases and trials before Courts of Session. ***See,*** Ss. 240(2.}, 246(2} and 228(2).
2. V.C. ***Shukla*** v. ***State,*** 1980 Supp SCC 92: 1980 SCC (Cri) 695, 753: 1980 Cri LJ 690,
3. *Ramkrishtict Sawalaram Redkar* v. *State of Maharashtra,* 1980 Cri Lj 254 (Bom).
4. ***State ofj&K*** v. ***Sudershan Chakkar,*** (1995) 4 SCC 181: 1995 SCC (Cri) 664.
5. ***See,*** observations in ***Bharat Parikh*** v. ***CBI,*** {2008} ro SCC 109: (2008) 3 SCC {Cri}

reasons if he decides to discharge the accused.[6] There is no need to appreciate evidence at this stage. Notably the judge is not empowered to invoke Section 311 and call witnesses at this stage of charging.[7]

The provisions regarding charge are contained in Sections 211 to 224 and 464. Sections 211 to 214 deal with what the charge should contain; Sections *zx6* and 217 mention the power of the court to alter the charge and the procedure to be followed after such alteration. Section 218 gives the basic rule that for every distinct offence there shall be a separate charge and every such charge shall be tried separately. Sections 219, 220, 221 and 223 give exceptions to the above rule. Section 222 deals with circumstances in which the accused can be convicted of an offence for which he was not charged. Section 224 mentions the effect of withdrawal of the remaining charges on conviction on one of the several charges. Sections 215 and 464 mention the effects of errors in stating the offence or other particulars in the charge, and of omission to frame, or error in the charge.

All these matters are to be discussed in this chapter. Before proceeding further, two things may be mentioned here. The Code does not give any proper definition of the term "charge". Section *2(b)* only says that "charge" includes any head of charge when the charge contains more heads than one.

The sections dealing with charge do not mention who is to frame the charge. The provisions dealing with different types of trials however provide that it is always for the court to frame the charge. As will be seen later,[8] the court may alter or add to any charge at any time before the judgment is pronounced. But if a person has been charged, the court cannot drop it.[9] He has either to be convicted or acquitted.[10] All this has an important bearing on the administration of criminal justice.

15.2 Form and content of charge

Section 211 mentions the details to be given in the charge specifying the offence with which the accused is charged.

2008 Cri LJ 3540; *Yogesh v. State of Maharashtra,* (2008) 10 SCC 394: (2009) 1 SCC (Cri) 51: 2008 Cri Lj 3872, Also see, *Rnkmini Narvekar* v. *Vijaya Satardekar,* (2008) 14 SCC 1: (2009) 1 SCC (Cri) 721: 2009 Cri Lj 822; *Bhimanna* v. *State of Karnataka,* (2012) 9 SCC 650: (2012) 3 SCC (Cri) 1210.

6. See, *State* v. *S. Bangamppa,* (2001) 1 SCC 369: 2001 SCC (Cri) 152; *Omwati* v. *State,* (2001) 4 SCC 333: 2001 SCC (Cri) 685. *Also see,* observations in *State of M.P.* v. *Rakesh,* (2004) 13 SCC 523: *{2.006}* 1 SCC (Cri) 760; *R.S. Mishra* v. *State of Orissa,* (2011) 2 SCC 689: (2011) 1 SCC (Cri) 785: 2011 Cri Lj 1654.
7. *Bijoyesh Ghosh* v. *State of W.B.,* 2000 Cri LJ 4311, 4514 (Cal).
8. *See infra,* para. 15.3.
9. *Kisan Seva Sahakart Samiti Ltd.* v. *Bachan Singh,* 1993 Cri Lj 2540 (All); *State of Maharashtra* v. *B.K. Suhbarao,* 1993 Cri Lj 2984 (Bom).
10. *Prakash Cbander* v. *State,* 1995 Cri LJ 368 (Del).

(i) Every charge under this Code shall state the offence with which the accused is charged. [S. 211(1)]

In cases where there are more than one accused the trial court should consider the case of each and every accused individually for finding out as to which of the offence was prima facie made out against each and all of the accused.[11]

{2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only. [S. 211(2)]

Illustration

A is accused of murder, or cheating, or theft, or extortion. The charge may state that A committed murder, or cheating, or theft, or extortion without reference to the definition of those crimes contained in the IPC [illustration (c) to S. 2,11]

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence *must be stated* as to give the accused notice of the matter with which he is charged. [S. 211(3)]

Illustration

A is charged under Section 184 of the Indian Penal Code (45 of i860) with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words, [illustration *{d)* to S. 211]

(4} The law and section of the law against which the offence is said to have been committed *shall* be mentioned in the charge. [S. 2x1(4)]

According to this rule, in the illustrations given above the section under which the offence is punishable must in each instance be referred to in the charge.

(5) The fact that the charge made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. [S. 211(5)]

Illustration

A is charged with murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in Sections 299 and 300 of the Indian Penal Code (45 of i860), that it did not fall within any of the general exceptions of the said Code; and that it did not fail within any of the five exceptions to Section 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it. [illustration (a) to S. **211]**

(6) The charge shall be written in the language of the court. [S. 211(6)] Section 272 empowers the State Government to determine what shall be, for the purpose of this Code, the language of each court within the State other than the High Court.

11. *hntiaz Ahmed* v. *State* of ATP., 1997 Cri L] 1844 (MP).

(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the court may add it at any time before sentence is passed. [S. 2.11(7)]

The purpose of this provision is to inform the accused adequately about the allegations regarding previous convictions which would expose him to enhanced punishment if found guilty of the offence charged. The accused by knowing of this contingency would get an opportunity to give his defence, if any, against these allegations. In practice the rule is more often invoked when the prosecution desires to bring the case under Section 75, Penal Code, i860 {IPQ for enhanced punishment.

Section 212 requires that the charge should give particulars as to time and place of the alleged offence and the person against whom the offence was committed. These requirements are given in (8) and (9) below.

(8) The charge shall contain such particulars as to time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. [S. 212(1)]

(9) The above rule is to an extent relaxed in a case of criminal breach of trust or of dishonest misappropriation. When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other movable property, it shall be sufficient to specify the gross sum or, as the case may be, describe the movable property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 219: provided that the time included between the first and last of such dates shall not exceed one year. [S. 212(2)]

The combined effect of Section 212(2) and Section 219(1), as would be seen later, is that a person accused of breach of trust may be charged with and tried at one trial for three such offences committed within the space of 12 months, and in regard to each such offence the relaxation as to stating particulars of time, place and amount may be availed of. But when the embezzlement has been going on for a long time, say three years, it is not permissible to rely on Section 212(2) for grouping together each year's embezzlement as one offence and then rely on Section 219(1) for trying the three charges at one trial. It is suggested that multiplicity of criminal

proceedings is not avoided in such a case because both the sections have the same period provide limit of one year.[12]

It is obvious that the relaxation given by the above rule is applicable only in case of criminal breach of trust or dishonest misappropriation and not in case of any other offence like theft, falsification of accounts under Section 477-A IPC, cheating, etc. The rule is intended to cover cases of persons who showed a deficiency in the accounts with which they were entrusted but who could not be shown to have misappropriated this or that specific sum.[13]

(10) When the nature of the case is such that the particulars mentioned in Sections 211 and 2.12 {he. the above nine sub-paragraphs) do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. [S. 213]

if) A is accused of cheating *B* at a given time and place. The charge must set out the manner in which A cheated B. (illustration {b} to S. 213]

(it) A is accused of obstructing *B,* a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which *A* obstructed *B* in the discharge of his functions, [illustration *id)* to S. 213]

{Hi} A is accused of the theft of a certain article at a certain time and place. The charge [in such case] need not set out the manner in which the theft was effected, [illustration *{a)* to S. 213]

(11) Section 214 gives a rule for interpreting the words used in the charge. It provides that in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under -which such offence is punishable. [S. 214]

Alteration of charge and the procedure to follow such alteration

15.3

According to Section 216(1), any court may alter or add to any charge at any time before judgment is pronounced. The section invests a comprehensive power to remedy the defects in the framing or non-framing of a charge, whether discovered at the initial stage of the trial or at any subsequent stage (including at the stage of S. 313 statement) prior to judgment.[14] In a case dropping of unsustainable charges before most of the prosecution

12. See, 41st Report, Vol. I, p. 1:55, para. 193.
13. *Shiam Sunder* v. *Emperor** (1932) 33 Cri Lj 343, 345: AIR 1932 Oudh 145, 147.
14. ***Enmnula Subharao*** v. ***State,*** 1979 Cri Lj 258, 262 (AP); see also, A.N. ***Mukerji*** v. ***State,*** 1969 Cri LJ 1203 (All); ***Jayantilal Vrajlal Barot*** v. ***State of Gujarat,*** 1968 Cri Lj 1173 (Guj); ***Ram N a gin a Roy*** v. ***Mohabir Kami,*** 1995 Cri. LJ 3084 (Gau); ***Tola Rant*** v. ***State***

witnesses were examined, was not permitted.[15] The Code gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him.[16] The court has very wide power to alter the charge; however, the court is to act judiciously and to exercise the discretion wisely. It should not alter the charge to the prejudice of the accused person.[17][18] In a case the addition of a new charge at the stage of cross-examination of the prosecutrix was held bad as the trial court did not inquire into the facts that gave rise to the prima facie case of the additional charge.[18]

15.3.1 *Power to alter charge*

The court's unrestricted power to alter charges before the pronouncement of judgment has been reiterated by the Supreme Court In *Jasvinder Saini* v. *State (Govt. ofNCT of Delhi)*[19][20],

There is absolutely no impediment for the court to frame charges even in summons cases. The fact that summons cases can be proceeded with even without framing charges, will not in any way take away the powers conferred upon the court under Sections 216 and 221 even in the matter of summons proceedings.

The following procedure is to be followed after the alteration or addition of the charge as it is necessary to ensure a fair trial:

(1) Every such alteration or addition shall be read and explained to the accused, [S. 216(2)] so as to enable him/her to prepare himself/herself to meet the fresh challenges.[21]

(2) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge. [S. 216(3)]

15. *Rajendra Singh Sethia* v. *State*, 1989 Cri Lj 255 (Cal).
16. *Kantilal Chandulal Mehta* v. *State of Maharashtra*, (1969) 3 SCC 166: 1970 SCC {Cri} 19. 23: 1970 Cri Lj 510, 514.
17. *Harihar Chakravarty* v. *State ofW.B.*, 1954 Cri Lj 724: AIR 1954 SC 266; *Muthu Goundan* v. *Emperor*, (1920) 21 Cri Lj 57 (Mad). Also see, *State of Maharashtra* v. *Salman Salim Khan*, {2004} 1 SCC 525: 2004 SCC {Cri} 337: 2004 Cri Lj 920; *Bah Seetharamaiah* v. *Per ike S. Rao*, {2004} 4 SCC 557: 2004 SCC (Cri) 1332: {2004) Cri LJ 2034; *Dalbir Singh* v. *State ofH.P.*, {2000) 5 SCC 82: 2004 SCC
18. *Ram Prashad* v. *State of M.P.*, 1997 Cri LJ 1846 (MP).
19. (2013) 7 SCC 256: {2013) 3 SCC (Cri) 295.
20. *K. Shanmugasimdara Pattar* v. *State Inspector Railway Police*, 1978 Cri LJ 468, 469 (Mad).
21. See, *Har Pal Singh* v. *State of V.P.*, 2000 Cri Lj 4552 (AH).

{3) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary. [S. 216(4}] Unless the court passes a specific order directing a new trial it is incorrect to presume that a new trial has commenced merely because of the fact that an alteration to a charge has been effectuated. The touchstone of such a direction, as to a fresh trial, would be an evaluation by the judge, as to whether prejudice has been caused to the accused or prosecution due to such an alteration.[22]

(4) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded. [S. 216(5)]

The concluding words—"unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded"—show that the legislature contemplated that sanctions under the Code would be given in respect of the facts constituting the offence charged.[23 24 25] The charge need not follow' the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates.[24 25]

(5) Whenever a charge is altered or added to by the court after the commencement of the trial, the prosecutor and the accused shall be allowed:

{a} to recall or resummon, and examine with reference to such alteration or addition any witness w'ho may have been examined, unless the court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purposes of vexation or delay or for defeating the ends of justice; and

[b) also to call any further witness whom the court may think to be material. [S. 217]

(6) Arguments regarding the framing of a proper charge are best left to be decided by the trial court at an appropriate stage. Otherwise it may happen that proceedings get protracted by the intervention of superior courts.[2]>

22. See, *Ranbir Yadav* v. *State of Bihar*, (1995) 4 SCC 392: 1995 SCC (Cri) 728.
23. *Gokulchand Dwarkadas Morarka* v. R., {1948) 49 Cri Lj 261, 263: (1947-48) 75 IA 30: (1948) 61 LW 257: AIR 1948 PC 82.
24. *Ibid*, 263.
25. *State of Maharashtra* v. *Salman Salim Khan.* (2004) 1 SCC 525: 2004 SCC (Cri) 337: 2004 Cri LJ 920.

Section 2.17 does not cast a duty or obligation on the court to inquire of the prosecution or the accused whether they would like to recall or resummon the witnesses as referred to in clause *(a),* or to call any further witnesses as dealt with in clause *(b)* of that section. However it is safer and desirable that the courts do inquire of the prosecution or the accused, as to whether they would like to exercise the right to recall or resummon the witnesses or to have further witnesses examined as provided in the section.[26]

15.4 Forms set forth for charges

The forms in which the charges are to be framed are set forth in Form No. 32, of the Second Schedule, and the same may be used with such variations as the circumstances of each case may require.[27] Some representative forms are given below:

I. CHARGES WITH ONE HEAD

I, (*name and office of Magistrate, etc.)* **hereby charge you {name** *ofaccusedperson)* **as follows—**

That you, on or about the _____ day of_____, at_____ , committed culpable homicide not amounting to murder, causing the death of_____ ,

and thereby committed an offence punishable under Section 304 of the Indian Penal Code, and within the cognizance of this Court.

. And I hereby direct that you be tried by this court on the said charge.

ISignature and seal of the Magistrate)

11. CHARGES WITH TWO OR MORE HEADS

I, (*name and office ofthe Sessions Judge, etc.)* **hereby charge you** (*name ofaccused person)* **as follows—**

First—That you, on or about the _____day of _____ ,

at _____, committed murder by causing the death

of _____, and thereby committed an offence punishable under

Section 302. of the Indian Penal Code, and within the cognizance of this Court of Session.

Secondly—That you, on or about the_____day of _____ ,

at _____ , by causing the death of _____, committed culpable

homicide not amounting to murder, and thereby committed an offence punishable under Section 304 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by this court on the said charge.

ISignature and seal of the Sessions Judge)

26. Moosa Abdul Rabiman v. *State of Kerala*, 1982. Cri Lj 1584, 13SS,

27. *See*, s. 476 of rhe Code which says: "Subject to the power conferred by Article 227

of the Constitution, the forms set forth in the Second Schedule, with such variations as the circumstances of each case require, may be

Alternative charge on Section 193 IPC

I, (*name and office ofthe Sessions Judge, etc.)* hereby charge you (*name of the accused person)* as follows

That you, on or about the _____day of _____, at_____ ,

in the course of the inquiry into_____, before _____ ,

stated in evidence that<' _____", and that you, on or about the _____

day of_____ , at _____, in the course of the trial of_____ , before _____ , stated in the evidence that " _____ ", one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under Section 193 of the Indian Penal Code, and within the cognizance of this Court of Session.

And I hereby direct that you be tried by this court on the said charge.

ISignature and seal of the Sessions Judge)

III. CHARGES FOR THEFT AFTER PREVIOUS CONVICTION

I, {name *and office ofthe Magistrate, etc,.),* hereby charge you *(name of accused person)* as follo^^s:

That you, on or about the _____day of _____, at_____ ,

committed theft, and thereby committed an offence punishable under Section 379 of the Indian Penal Code, and within the cognizance of the Court of Session *(or* Magistrate, *as the case may be).*

And you, the said *{nameof accused),* stand further charged that you, before the committing of the said offence, that is to say, on the_____ day of _____ , had been convicted by the (*state Court by which conviction* was *had)* at _____ of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of housebreaking by night (*describe the offence in the words used in the section wider which the accused was convicted),* which conviction is still in full force and effect, and that you are hereby liable to enhanced punishment under Section 75 of the Indian Penal Code.

15.5

Basic rule regarding charge and its trial

The initial requirement of a fair trial in criminal cases is a precise statement of the accusation. The Code seeks to secure this requirement, first, by laying down in Sections 211 to 2x4 as to what a charge should contain; next, stipulating[28] in Section 218 that for every distinct offence there should be a separate charge; and lastly, by laying down in the same section that (except in certain specified cases) each charge should be tried separately, so that what is sought to be achieved by the first two rules is not nullified by a

ininnor /-\t niimormic in [illegible] irrrac [28] [29]

28. *Sidhardan* v. *fmsannan,* 2.006 Cri LJ 2568 (Ker).

29. *See,* 41st Report, p. T57, para. 19.7; *also see.* observations in *Sanatan Mondal* v. *State,* 1988 Cri LJ 238 (Cal).

Separate charges for distinct offences

Section. 218 reads as follows:

218. (1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately:

Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person,

{2) Nothing in sub-section (1) shall affect the operation of the provisions of Sections 219, 220, 221 and 223.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

The reason for the proviso to sub-section (1) above is simple. Where the accused himself wants joint trial or joinder of charges, the court *may* allow the same notwithstanding the strict rules in other provisions. This is because the rules in this regard are designed for the benefit of the accused and if they work to his detriment, he should get relief.[30] Further, it has been considered as sufficient compliance with the proviso if there is found to be *implied* consent of the accused person and also the *implied* opinion of the Magistrate regarding want of prejudice to the accused.[31][32][33]

According to sub-section (2), the operation of Sections 219, 220, 221 and 223 shall not be affected by the above said basic rule. In other words these sections are exceptions to the basic rules contained in Section 218(1). These exceptions are based on some rational principle or other. In Section 219, which permits a joint trial for offences of the same kind not exceeding three in number and committed within a period of 12 months, the principle is the avoidance of a multiplicity of proceedings.[32][33] In Section 220(1}, the principle is the relation between offences forming part of the same transaction separate trials whereof will naturally result in an incomplete comprehension of the totality of the crime even where they do not lead to conflicting judgments.[53] When the offences of criminal breach of trust or dishonest misappropriation of property are accompanied by falsification of accounts (or analogous offences), Section 220(2) proposes to give full effect to the fiction created by Section 212(2) in relation to the rule contained in Section 220(1) mentioned above. The principle behind Section 220(3) [anA] is that if a criminal act has several aspects, all of them should be adjudged together. Section 221 provides for the not so

30. Notes on els.
31. *Manobarlal Lobe v.*
32. *Ravinder Pal Singh* v.
33. *State of Bihar* v. *Simranjit Singh Mann,*

rare class of cases in which while broad facts concerning an offence are, or can be established by the evidence, not all the incidents and circumstances are known. In such cases it is permissible to charge the accused with having committed all or any of different but connected offences, and also to convict him of an offence with which he has not been expressly charged but might have been charged.[34] Lastly, Section 223 permits a joint trial of several persons in specified cases because of some basic connection between the various offences committed by them.[35]

The object of Section 218 is to save the accused from being embarrassed in his defence if distinct offences are lumped together in one charge or in separate charges and are tried together.[36 37 38] Another reason is that the mind of the court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the court trying him on one of the charges not to be influenced by the evidence against him on the other charges.[37 38]

The strict observance of Section 218(1) may lead to multiplicity of trials, therefore exceptions, in suitable cases, have been provided by Section 218(2) in Sections 219, 220, 221 and 223.

Joinder of charges

In *K. Satwant Singh* v. *State of Punjaba* five-judge Bench held that Sections 234 to 236 and 239 of 1898 Code are permissive sections. They are not compelling sections. That is to say, although these sections permit joinder of charges and joinder of persons, a court may well consider it desirable in the interest of justice and having regard to the circumstances of a particular case that the charges framed should be split up and separate trials should take place in respect of them and the accused be tried separately. It was to avoid multiplicity of trials, harassment to the accused and waste of time that the permissive Sections 234 to 236 and 239 enable a court, within their terms, to join charges and persons in a single trial.

The section requires a separate charge to be framed for every *distinct* offence. It does not say "for every offence" or "for each offence". A *distinct* offence is distinguished from another offence by *a)* difference in time of their occurrence, or *b)* place or *c)* victims of crimes being different, or *d)* the acts constituting the offences are covered by different sections. It has been held that "distinct offence" must have different content

15.5.1

34. See. *Ghan Shyam* v. *State of U.P.,* 2004 Cri LJ 967.
35. *See,* 41st Report, p. 157, para. 19.7.
36. *Aftab Ahmad Khan* v. *State of Hyderabad,* 1954 Cri Lj 1155, 1158: AIR 1954 SC 456; see also, *R.P. Reddy* v. *Chand Mohd.,* 1973 Cri Lj r08z, 1085
37. *Queen Empress v.Jwala Prasad.* ILR (1884) 7 Ail
38. AIR i960 SC 266.

from the expression "every offence" or "each offence". Separate charge is required for every distinct offence and not necessarily for "every" or "each" offence. Two offences are distinct if they are non-identical and are not in any way interrelated.[39]

The effects of non-compliance with provisions regarding charge would be considered later. It would, however, be useful to allude to the decision of the Supreme Court in context of non-compliance with Section 218. In every case, in which a departure from the requirements of Section 218 has occurred, the question before the court is, whether the omission to frame the required charge has or has not in fact occasioned a failure of justice by prejudicing the accused in his defence, and whether he has thus been deprived of a fair trial.[40]

15.6 Exception 1 to basic rule

Three offences of same kind within year may be charged together.—In creating this exception, it was considered expedient to avoid multiplicity of the proceedings under the circumstances mentioned in Section 219. That section provides:

Three offences of same kind within year may be charged together

219. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2} Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of i860}, or of any special or local laws:

Provided that, for the purposes of this section, an offence punishable under Section 379 of the Indian Penal Code (45 of i860} shall be deemed to be an offence of the same kind as an offence punishable under Section 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

The term "person" is not to be interpreted as including several persons. Section 223 specifically deals with the case of several accused persons and therefore it is not necessary to construe the singular "person" as including "person".[41] However, the Madras High Court has taken the view that "a person" is not intended to exclude the plural number.[42] Considering the objective of Section 219 and the separate provision made in Section 223,

39.
40. M
41.
42.

the opinion expressed by the Madras High Court does not appear to be sound one.

There are conflicting judicial opinions as to whether Sections 219 to zzi and ZZ3 are mutually exclusive or whether they can be used to get a cumulative effect. In other words, the question is whether it is open to the prosecution to take help partly of one section and partly of another section in order to justify the joinder of charges or whether the intention of law is that sections should be mutually exclusive and only one of the them can be availed of at one time. The Allahabad High Court has pointed out in this connection that each of the four Sections zip, zzo, zzi and ZZ3 mentioned in Section zi8 can individually be relied upon as justifying a joinder of charges in respect of any trial. Use cannot be made of two or more of these sections together to justify a joinder.[43] In other words, it is not open to the prosecution to take the help partly of one section and partly of another in order to justify the joinder of charges.[44] Further it has been observed that the normal rule as embodied in Section zi§ has been made subject to the exceptions laid down in Section Z19 or zzo or zzi or ZZ3. Each section is to be an exception individually. It is not the intention of the legislature to group together different sections in order to constitute an exception.[45] A contrary view was expressed earlier in some cases.[46] It appears that this "contrary" view is now less acceptable.

Exception 2 to basic rule

15.7

Offences committed in course of same transaction can be charged, at one trial.—If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. [S. zzo(i)]

(i) *A* rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B w-as. A may be charged with and tried at the same time for offences under Sections 2.25 and 333 of the IPC. [illustration *{a}* to S. 220(1)]

(ii) *A* threatens B, C and *D* at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences [in one trial] under Section 506 of the Indian Penal Code (45 of i860), [illustration *(h)* to S. 220 (i)]

43. *Sri Ram Varma* v. *State.* 1956 Cri LJ 959, 966: AIR 1956 All 466 {FB).
44. *G.N. Kulkarni* v. *Slate,* 1973 Cri Lj 551, 55Z (Mys).
45. *Ibid*; see also. *Emperor* v. *Dbaneshram,* (1926) 27 Cri LJ 1099, 1100: AIR 1927 Nag 223; *D.K.*
46. *Ram Kishoon Prasad* v . *Emperor.* (1934) 35 Cri LJ 876, 878: AIR

Where the accused persons are more than one, the words "by the same person" clearly show that the rule will not cover their case; however in such a situation Section 223 might apply.

The word "transaction" has not been defined in the Code. The word is one of elastic import and it has been probably advisedly left undefined.[47] The observations of the Supreme Court in this connection are worth quoting. The court says:

> What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a, strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction....[48]

In this sub-section, the principle is the relation between offences forming part of the same transaction, separate trials whereof will naturally result in an incomplete comprehension of the totality of the crime even where they do not lead to conflicting judgments.[49] According to this sub-section, where several offences are committed in the course of the same transaction they may be tried jointly and it is immaterial whether the offences are of the same kind or not, or whether their number exceeds three or not, and whether the offences are committed within a period of one year or not. Further, it has been held that a court having jurisdiction to try certain offence committed in the course of a transaction, can hold an inquiry or trial even in respect of an offence committed in the course of the same transaction but beyond its jurisdiction.[50]

47. *R.P. Red*
48. *Stat*
49. 41st
50. *Stat*

It has also been held that Section 220 is an enabling provision which permits the court to try more than one offence in one trial. The court may or may not try all the offences together in one trial.[51]

Exception 3 to basic rule

15.8

Offences of criminal breach of trust or dishonest misappropriation of property and their companion offences offalsification of accounts to be tried at one trial.—When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in Section 2,12(1) or in Section 219(1) is accused of committing;, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with and tried at one trial for every such offence. [S. 220(2)]

Many a time the offence of criminal breach of trust or dishonest misappropriation of property is accompanied with the offence of falsification of accounts, the latter offence being committed for the purpose of facilitating or concealing the commission of the former offence. Section 220(2} enables to have these offences tried at one trial.

Exception 4 to basic rule

15.9

Same act falling under different definitions of offences, such offences may be tried at one trial.—If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for, each of such offences. [S. 220(3)3

Illustrations

(i) A wrongfully strikes S with a cane, *A* may be separately charged with, and convicted of, offences under Sections 352 and 323 of the Indian Penal Code {45 of i860), (illustration (i) to S. 220(3)]

[it) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. *A* may be separately charged with, and convicted of, offences under Sections 317 and 304 of the Indian Penal Code (45 of i860) [illustration *(k)* to S. 220(3)]

This Section 220(3} [ma]y b[c] conveniently read with Section 71 IPC which inter alia provides that "where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences". In such a case, however, the accused can be charged with and tried in one trial for all such offences.

51. *Mob in der Singh* v. *State of Punjab,* (1998) 7 SCC 390: 1998 SCC (Crij 1638.

15.10 Exception 5 to basic rule

Acts forming an offence, also constituting different offences when-taken separately or in groups—all such offences to be tried at one trial.—If several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one or more, of such acts. [S. 220(4)]

Illustration

A commits robbery on *B,* and in doing so voluntarily causes hurt to him. *A*
may be separately charged with, and convicted of, offences under Sections 32.3,
392 and 394 of the Indian Penal Code (45 of i860), [illustration *(m)* to S. 220(4)]

Here again the provision contained in Section 71 IPC may be usefully referred to. That section, inter alia, provides that where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences. However according to Section 220(4), the accused person can be charged with and tried at one trial for all such offences.

Section 220(5) provides that nothing contained in Section 220 shall affect Section 71 IPC. The impact of Section 71 IPC on sub-sections (3} and (4) of Section 220 have already been considered above, [paras. 15.9

15.11 Exception *6* to basic rule

Where it is doubtful what offence has been committed.—**Section 221 provides as follows:**

Where it is doubtful what offence has

221. (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

{2} If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be

receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

b) In the case mentioned, A is only charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods {as the case may be), though he was not charged with such offence.

(c) A states on oath before the Magistrate that he saw *B* hit C with a dub. Before the Sessions Court A states on oath that *B* never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot he proved which of these contradictory statements was false.

The section provides for the not unusual type of case in which broad facts concerning an offence are, or can be, established by the evidence, not all the incidents and circumstances are known. In such cases it is permissible to charge the accused with having committed all or any of different but connected offences, and also to convict him of an offence with which he has not been expressly charged but might have been charged.[52]

There is absolutely no impediment for the court to frame charges even in summons cases. The fact that summons cases can be proceeded with even without framing charges, will not in any way take away the powers conferred upon the court under Sections 216 and 221 even in the matter of summons proceedings.[53] [54]

The condition on which the section comes into operation, must be complied with, and there must be single act or series of acts of a certain nature, and that nature must raise a doubt about which of several offences the facts, which can be proved, will constitute. But that doubt may include a doubt as to what exact facts within the ambit of the series of acts postulated can be proved. At the time the charge is framed, the prosecution can never know exactly what facts they will succeed in establishing. The most promising witness may break down in cross-examination; and the prosecution are entitled to say: "If we prove certain of our alleged facts, then such an offence will he committed; but if we prove other of such facts, then it will be another offence", and to charge the offences in the alternative."[4]

The section, to some extent, lacks clarity. Illustration (c) is hardly covered by the words of the section inasmuch as when a person makes on oath two contradictory statements, and the prosecution cannot prove which of them is false, he does not commit several offences but only one. The illustration is, for practical purposes, a distinct rule enabling the court to frame a charge of intentionally giving false evidence without specifying whi ch one of two or

52. *See*, 41st Report, p. T57, para. T9.7.
53. *K. Shanmugasundara Pattar* v. *State Inspector Railway Police*, 197S Cri LJ 468, 469 {Mad).
54. *Emperor* v. *Kasamalli Mirzalli*, (1942} 45 Cri Lj 529, 532-533: AIR 1942 Bom 71 {FB}; see also. *Sunil Kumar Paul* v. *State ofW.B.*, (1965) 1 Cn LJ 630, 634: AIR 1965 SC 706; *Ami* v. *Admn*,

or believed to be false, or did not believe to be true. This is referred to in the illustration as charging in the alternative.[55]

The section appears to provide that an offender can be alternatively or cumulatively charged when it is doubtful whether the facts proved are capable of holding the offender guilty either of the principal offence or abetment of the offence when he is charged with the commission of principal offence and *vice versa.*[56] [57] [58]

Section 221(2) gives wide power to the court to convict the accused of a crime not the subject of the charge provided 1) that the crime of which the accused was found guilty was established by the evidence and 2) that having regard to the information available to the prosecuting authorities, it was doubtful which of one or more offences would be established by the evidence.[57] [58] It may, however, be noted that the section is applicable in respect of cognate offences such as theft and criminal breach of trust, and that it does not refer to offences of a distinct character such as murder and theft. Where the accused is charged with murder under Section 302 IPC, he cannot be convicted under Section 194 IPC.[IS]

15.12 Exception 7 to basic rule

Certain persons may be charged jointly.—**Section 223 provides as follows:**

What persons may be charged jointly **the**

223. The following persons may be charged and tried together, namely:

(a) persons accused of the same offence committed in the course of same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of Section Z19 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

55. *See.* 41st Report p. 159, para. 19.3 2.
56. *N.C. Shah* v. *State of Gujarat,* 1972 Cri Lj 200, 203 (Guj); see also,
57. *Thakur Shah* v. *Emperor,* (1944) 45 Cri Lj 126, 128: AIR 1943 PC 192; see also, *Begu* v. *King Emperor,* {1925} 26 Cri LJ 1059: AIR 1925 PC 130; *Be joy Chand Patra* v. *State,* 1952 Cri Lj
58. *AcbhutRai* v. *Emperor,* (1926) 27 C ri Lj

f) persons accused of offences under Sections 411 and 414 of the Indian Penal Code (45 of i860} or either of those sections in respect of stolen property the possession of which has been transferred by one offence; (g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of i860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate [59][or Court of Session] may, if such persons by an application in writing, so desire, and if he [60][or it] is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

The section permits a joint trial of several persons in specified cases because of some basic connection between the various offences committed by them.[61] The various clauses of the section need not be treated as mutually exclusive, and it is permissible to combine the provisions, of two or more clauses. The joint trial of several persons partly by applying one clause and partly by applying another clause is authorised.[62]

The rules contained in Sections 218 and 223 are designed for the benefit of the accused persons, and if they work to their detriment they should get relief provided the court also considers it appropriate to give such relief. The proviso seems to have been enacted in recognition of this principle. It is similar to the proviso to Section 218. The proviso would help in avoiding multiplicity of criminal proceedings and thereby save time and money. The accused persons whose cases are not covered by any of the clauses of Section 223 cannot however, claim a joint trial just by asking for it; the court must be satisfied that the persons would not be prejudicially affected by joint trial. The proviso further regulates the exercise of the court's discretion in this behalf by providing that the order will be passed only if it is expedient.[63]

Here, the first thing to be noticed is that Section 223 does not read as if its various clauses can be applied only alternatively. On the other hand at the end of clause *(f)* there is a conjunction "and". If the intention of the legislature was that the provisions of these clauses should be available only alternatively it would have used the word "or" and not "and" which has the opposite effect. Grammatically therefore it would appear

59. *Ins.* by Act 25 of Z005, S. *zi{a)* (w.e.f.
60. *Ins.* by Act 25 of 2005, S. *zi{b}* (w.e.f.
61
62. *Ibid, i6z,* para. 19.18.
63. *See,* joint Committee Report, p. xix.

that the provisions of the various clauses are capable of being applied cumulatively. The opening words of the section show that it is an enabling provision and, therefore, the court has a discretion to avail itself cumulatively of two or more clauses.[64] On a plain construction of the provisions of Section 223, it is open to the court to avail itself cumulatively of the provisions of the different clauses of Section 223 for the purpose of framing charges and charges so framed by it will not be in violation of the law, the provisions of Sections 218, 219 and 220 notwithstanding.[65]

The concluding portion of Section 223, namely—"and the provisions contained in the former part of this chapter shall, so far as may be, apply to all such charges"—shows that the provisions contained in the former part of Chapter XVII of the Code shall, as far as may be, apply to the charges framed with the aid of Section 223. Does this mean that the provisions of Sections 2x8, 219, 220 and 221 must also be complied with? The Supreme Court, after considering the merits of various suggested interpretations of the clause, finally concluded:

> Thus, while it is clear that the section preceding [S. 223] have no overriding effect on that section, the courts are not to ignore them but apply such of them as can be applied without detracting from the provisions of. [S. 223] Indeed the very expression 'so far as may be' emphasises the fact that while the earlier provisions have to be borne in mind by the Court while applying [S. 223! it is not these provisions but the latter which is to have an overriding effect.[66]

In Section 220(1) the expression "same transaction" has been qualified by saying that the transaction must be formed by "one series of connected acts".[67][68] The expression "same transaction" appearing in clauses *(a)* and *{b)* of Section 223 is without such qualification. Doubt may arise as to whether the expression "same transaction" as used differently in the two sections carries different meanings. This question was considered by the Supreme Court. The court observed:

> ... a transaction may consist of an isolated act or may consist of a series of acts. The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction
> but would constitute a different transaction or transactions ..... the expression "same transaction" occurring in [clauses *(a)* and *(b)* of Section 223] as well as that occurring in [S. 220 (1)] ought to be given the same meaning according to the normal rule of construction of

64. *State of A.P. v.*
65. *Ibid,* 683.
66.
67. *See*
68.

It has been ruled by the Supreme Court that it is not possible for the court under Section 223 of the code to club and consolidate the case on a complaint where the prosecution versions in the police challan case and the complaint case are materially different, contradictory and mutually exclusive.[69 70]

Clause (a): The words "same offence" means an offence arising out of the same act or series of acts/° They imply that the accused person must have acted in concert or association.[69 70 71]

Clause (b): Under this clause, the joinder of three charges under Section 420 IPC against one accused with three charges of abetment of those offences against another accused is legally permissible and proper.[72]

Clause (c): The words "within the meaning of Section 219" indicate that, what was meant by the words "offence of the same kind" in clause *(c)* of Section 223 is the same thing as was meant by the identical expression used in Section 219(1) and defined in Section 219(2} and nothing more. If it was the intention of the legislature to provide that the number of offences for which several accused persons could be tried under clause (c) of Section 223 should be limited to three as provided in Section 219(1), the legislature would have expressed the same in so many words.[73]

Clause (d): The offence of conspiracy and the offences committed by each conspirator in pursuance of the conspiracy are "offences committed in the course of the same transaction" within the meaning of Section 220, and persons accused of such offences can be tried jointly at one trial.[74] The common concert and agreement which constitute the conspiracy serve to unify the acts done under it.[75] Identity of time is not an essential element in determining whether certain events from the same transaction within the meaning of Section 223. It is the continuity of action and the sameness of purpose that determine whether the events constitute the same transaction. In *Purushottamdas Dalmia* v. *State of W.B.*[76], it has been held by the Supreme Court that the court having local jurisdiction to try the offence of criminal conspiracy can also try all offences committed in pursuance of that conspiracy', even if those offences were committed outside

69. *Harjinder Singh* v, *State of Punjab*, (1985) 1 SCC 422: 1985 SCO (Cri) 93-. 1986 Cri
70. *Amar Singh* v. *State*, (1954) 55 Cri tj 636, 638: AIR 1954 Pun; 106.
71. *Jadunandan Prasad* v. *Emperor*, {1916} 17 Cri LJ 234 (Par); *Emperor v. Sejmal Punamchand*, ILR (1926) 51 Bom 310, 322.
72. *K. SatwaniSingh* v. *Stale of Punjab*, 1960 Cri LJ 410, 419: AIR 1960 SC 266.
73. *State of A.P.* v. *Cheemalapati Ganesivara Kao*, (1963) 2 Cri LJ 671, 681: AIR 1963 SC 1S50,
74. *Babulai Cbaukhani* v. *King Emperor*, (1938) 39 Cri LJ 452, 456: AIR 1938 PC 130; *Kadiri Kunhahammad* v. *State of*
75. *Gabulai Choukhani* v. *King Emperor*, (1938) 39 Cri LJ 452, 456: AIR 1938 PC 150; *S. Sivamirathnam* v. *State of Madras*, 1957 Cri
76. (19612 2 Cri LJ 72S: AIR 1961 SC 1589, 1593; see

the territorial jurisdiction of that court; and on the parity of reasoning the Supreme Court has held that the court having jurisdiction to try an offence committed in pursuance of a conspiracy, is empowered to try the offence of such conspiracy, even if it was committed outside its jurisdiction.[77 78] This matter has already been considered in Chapter 9 dealing with local jurisdiction of courts.[75]

Clause (e): An offence which includes theft means an offence of which theft is an essential ingredient.

Clause {f) : The expression "possession of which has been transferred by one offence" refers to the original theft of the property stolen on one occasion.[77 78 79] Therefore where different properties stolen at one theft were received by several persons at different times, all or any of such receivers can be tried jointly for their offences of receiving stolen properties.[80] However, persons found in possession of such stolen properties secured by *different* thefts (by more than one thefts} cannot be tried jointly under this clause.[81]

Clause (g): The clause does not need any further explanation.

15.13 Power of court to order separate trial in cases where joinder of charges or of offenders is permissible

The basic rule regarding charge is that for every distinct offence there shall be a separate charge and for every such charge there shall be separate trial. The only exceptions recognised are contained in Sections 219, 2.2,0, 221 and 223. Therefore separate trial is the rule and the joint trial is an exception. The sections containing the exceptions are only enabling provisions. A court has got the discretion to order a separate trial even though the case is covered by one of the exceptions enabling a joint trial.[82] A joint trial of a very large number of charges is very much to be deprecated even though it is not prohibited by law. A separate trial is always desirable whenever there is risk of prejudice to the accused in a joint trial.[83]

The Supreme Court has taken the view that it is the option of the court whether to resort to Sections 219, ZZO and 223 of the Code or whether to act as laid down in Section 218 and that the accused has no right to claim joinder of charges or of offenders.[84]

77. *L.N.*
78. *See*
79. *Emperor*
80.
81. *Bbaggan*
82. *Alimu*
S3. *Akh il*
84. *Ranchhod Lai* v. *State of M.P.,* (1965} 2 Cri LJ 253: AIR 1965 SC

It may be relevant to note that the question whether misjoinder of charges and joint trial for distinct offences in a court martial would be irregular was answered by the Supreme Court saying that the principles underlying the provisions in the Criminal Procedure Code, 1973 (CrPC) would provide guidelines as a general court martial is a substitute of criminal trial.[85 86 87]

Conviction of an offence not charged when such offence is included in offence charged

15.14

Where the accused person is charged with an offence consisting of several particulars, some of which when combined and proved form a complete minor offence, he may be convicted of minor offence though he was not charged with such minor offence. That is in cases where the minor offence is a component of the major offence. For example, a person charged under Section 3 26 IPC can be punished under Section 32.4 IPC. There is also another situation where facts are proved which reduce the offence charged to a minor offence. Here the offence for which punishment is imposed need not be a component of the major offence. But the major offence must be more or less a cognate offence. For example, in the case of an accused charged under Section 302 IPC if any of the exceptions to Section 300 is proved to exist, he could be punished under Section 304 IPC even though there is no charge under that section.[86 87] If an accused husband is not found guilty of offence under Section 304-B, he cannot be convicted under Section 306 in the absence of that charge unless materials on record are such which would establish said charge against accused.[S/] It has been ruled by the Supreme Court that accused could be convicted under Section 366 and Section 354 IPC by invoking Section 222 of Code when he is charged with the larger offence under Section 376/511 IPC.[88] The proposition is based on the principle that graver charge gives notice to the accused of all the circumstances going to constitute the minor one of which he may be convicted. The principle is embodied in Section 222 which reads as follows:

> 222. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he tvas not charged with it.

When offence proved included in offence charged

85. See, ***Union of India*** v.
86. ***State of Kerala*** v. ***Rajappan Nair,*** 1987 Cri Lj 1257 (Ker).
87. ***Harjit Singh*** v.
88. ***Tarkeshwar Sahu*** v. ***State of Bihar,*** (2006) 8 SCC 560: (2006) 3 SCC (Cri) 576

(z) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, aithough he is not charged with it.

(3} When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.

Illustrations

{a) A is charged, under Section 407 of the Indian Penal Code (45 of i860), with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under Section 406 of that Code in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under rhe said Section 406.

(b) A is charged, under Section 32.5 of the Indian Penal Code {45 of i860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of that Code.

The meaning of the expression "minor offence" is not defined or explained in the Code. The minor offence for the purposes of Section 222 is not something independent of the main offence or which is simply punishable with lesser punishment. The major and minor offences must be cognate offences and not such as are totally constituted by different elements. As already discussed the minor one must be constituted by some of the elements of the main offence.[89] As such Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 CrPC for the offences are of distinct and different categories.[90] So is the case with Section 366 IPC which is held to be not a minor offence in relation to offence under Section 3y6 IPC.[91]

According to sub-section (3), when a person is charged with an offence, he may be convicted of an attempt to commit such offence although he is not separately charged. The sub-section does not cover abetment of an offence. [89 90 91 92 93]

89. ***Makban*** v.

90. *Sangar*

91. See, ***Surendra Rai*** v. ***State of Bihar,*** 2013 Cri LJ 1847: (2013) 124

92. ***Emper***

93.

Applicability of provisions relating to joinder of charges to cases where no charge is framed 15.15

As will be seen later, in all summons cases though it is necessary to state to the accused the particulars of the offence of which he is charged, it is not necessary to frame a formal charge. In such cases a question may arise whether the provisions relating to joinder of charges and of offenders are applicable to such proceedings. The Code does not make any express provision in this regard. However the courts have taken the view that these provisions are equally applicable in summons cases also.[94]

Withdrawal of remaining charges on conviction on one of several charges 15.16

Section 224 reads as follows:

Withdrawal of remaining charges on conviction on one of several charges

> *2.24.* When a charge containing more heads than one is framed against the
> same person, and when a conviction has been had on one or more of them,
> the complainant, or the officer conducting the prosecution, may, with the con-
> sent of the Court, withdraw the remaining charge or charges, or the Court of
> its own accord may stay the inquiry into, or trial of, such charge or

The section is applicable where the accused is convicted of one of several distinct charges before the other charges are tried. It is necessary that the several charges made must be in respect of distinct offences and the section will not apply where the several charges are made under Sections 220(3), 220(4), o[r] Section 221.

Effects of omission to frame, or absence of, or error in charge 15.17

The matters have been provided in Sections 215 and 464, The object of these sections is to prevent failure of justice where there has been only technical breach of rules not going to the root of the case as such. The two sections read together lay down that whatever the irregularity in framing of a charge, it is not fatal unless there is prejudice caused to the accused.[95] Section 215 reads follows:

> 215. No error in stating either the offence or the particulars required to be *Effect of errors* stated in the charge, and no omission to state the offence or those particulars.

para. 15.n and fn. 56,

94. ***Upendra Nath Biswas*** v. ***Emperor.*** ILR (1915) 41 Cal 694. 702-03; ***Indramani*** v. ***Chanda Bewa,*** 1956 Cri LJ 121S: AIR 1956 On' 191, 192; ***K.S. Imam Sahib, re,*** (1954} 55 Cri Lj 71:: AIR 1954 Mad 86, 87; ***Emperor*** v. ***Amolak Mulchand,*** {1933) 34 Cri L] 1175: AIR T933 Nag 368; see also, ***K. Sbamnugasundara Pattar*** v. ***State Inspector Railway Police,*** 1978 Cri Lj 468, 469 (Mad).
95. ***Kailash Girv.*** V.K. ***Khare,*** 1981 Cri IJ 1555, 1556 (MP).

shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Illustrations

(a) A is charged under Section 242. of the Indian Penal Code (45 of i860}, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit", the word "fraudulently" being omitted in the charge. Unless it appears that A was in ract misled by this omission, the error shall not be regarded as material.

(b} *A* is charged with cheating B, and the manner in which he cheated B is nor set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating *B,* and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) *A* is charged with the murder of Khoda Baksh on the 21st January, 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January, 1882. *A* was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(<?} A was charged with murdering Haider Baksh on the 20th January, 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January, 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses [96]

Effect of omission to frame, or absence

96. *Bhagabat Das* v. *State of Orissa,*

(z) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

The *mere* omission to frame a charge or a *mere* defect in the charge is no ground for setting aside a conviction. Procedural laws are designed to subserve the ends of justice and not to frustrate them by mere technicalities. The object of the charge is to give an accused notice of the matter he is charged with. That does not touch jurisdiction. If the necessary information is conveyed to him and no prejudice is caused to him because of the charges, the accused cannot succeed by merely showing that the charges framed were defective.[1] Nor could a conviction recorded on charges under wrong provisions be reversed if the accused was informed of the details of the offences committed and thus no prejudice was caused to him.[2] Rejecting the plea that since there was no conviction for a particular charge, it could be deemed to be acquittal, the Supreme Court reiterated:

> We are, therefore, of the opinion that the question of deemed acquittal in such a case where the substantive charge remains the same and a charge under Sections joz/izo-B and an alternative charge under Sections **30Z/34** IPC had been framed, there was nothing remiss in the High Court in modifying the conviction to one under Section **30Z/307/34** IPC. It is also self-evident that the accused were aware of all the circumstances against them.[3]

In this context the Supreme Court's following observations are pertinent:

> We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions [relating to charge] that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent.[4]

This does not mean that the judges and Magistrates can overlook or ignore the provisions relating to charge. Nor does it mean that the rules can be disregarded and be kept aside. "Of course, the rules should and

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3. ***Satyavir Singh Rathi, ACP*** v. ***State,*** {2011) ***6*** SCC i: (2

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ought to be punctually observed. But Judges and Magistrates are fallible and make mistakes and the question is what is to be done in the exceptional class or case in which there has been a disregard of some express provision".[5] The real problem is, when an express provision regarding charge has been violated, what are the consequences of such violation. Does it result in an illegality that strikes at the root of the trial and cannot be cured or is it an irregularity that is curable? The terms "illegality" and "irregularity" have acquired a technical significance and are convenient to demarcate a distinction between two classes of cases. These terms were first used by the Privy Council in N. A. *Subramania Iyer* v. *King Emperor*[6] and repeated in later cases; but it is to be noted that the Code does not use the term "illegality" in this context. The Code refers to both classes as "irregularities" only; some irregularities vitiate the proceedings, [S. 461] and others do not. [S. 460] Proceedings that come under Section 461 are "void". Section 464(1} uses the words "shall be deemed invalid" which indicate that a total omission to frame a charge (or any error, omission or irregularity in the charge including misjoinder of charges) would render the conviction invalid but for Section 464(1) which serves to validate it when that sort of "irregularity" has not occasioned a failure of justice.

In this context it would be most appropriate to quote extensively the observations of the Supreme Court in *Willie (William) Slaney* v. *State of* M.P.[7] There the court observed:

> We do not attach any special significance to these terms. They are convenient expressions to convey a thought and that is all. The essence of the matter does not lie there. It is embedded in broader considerations of justice that cannot be reduced to a set formula of words of rules. It is a feeling, a way of thinking and of living that has been crystallized into judicial thought and is summed up in the admittedly vague and indefinite expression "natural justice": something that is incapable of being reduced to a set of formula of words and yet which is easily recognisable by those steeped in judicial thought and tradition.
>
> In the end, It all narrows down to this: some things are "illegal" that is to say, not curable, because the Code expressly makes them so; others are struck down by the good sense of judges who, whatever expression they may use, do so because those things occasion prejudice and offend their sense of fairplay and justice.[8]

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Chapter 16

Trial Procedures: Some Common Features

Object and scope of the chapter

The Code has adopted four distinct modes of trials. They are: i) trial before a Court of Session, z) trial of warrant cases, 3) trial of summons cases, and 4) summary trials. For the purposes of determining the mode of trial, all criminal cases, in the first instance, are divided into two categories. Those relating to offences punishable with death, imprisonment for life or imprisonment for a term exceeding two years form one category, and are called "warrant cases".[1] The first two modes of trials are adopted in such cases. The other criminal cases *(Le.* cases other than warrant cases), which are relatively of less serious nature form the second category and are termed as "summons cases".[2] The last two modes of trials mentioned above have been made applicable to such cases. Each of these two categories of cases have been further subdivided into two classes on the basis of the seriousness of the offences. The more serious amongst the warrant cases are tried according to the first mode of trial by a Court of Session, and on the other side, the less serious amongst the summons cases are tried summarily according to the fourth mode of trial. The logic in having different types of trials is simple. In cases relating to very serious offences it is just and appropriate to have elaborate trial procedure which would ensure and also appear to ensure, a high degree of fairness to the accused and also a high degree of precision in reaching correct conclusions. On the other hand, in cases of numerous offences of less serious nature it would be expedient to adopt simple and less elaborate

1. *See supra*, S. 2(;t),
2. *See supra*, S. *z(w),*

procedures, and in the vast number of petty cases it becomes necessary even to have summary procedures.

These four types of trial procedures will be discussed in Chapters 19, 20 and 21. The four modes of trials have, however, some features in common. Some of them have already been discussed in Chapters 1 3 , 1 4 and 1 5 dealing with principle features of fair trial, courts and parties, and charge. Some common procedures are to be discussed here in this chapter. They relate to language of courts, direction to have expeditious trial, power of court to have local inspection and to summon material witnesses, power and duty of court to examine the accused person, oral and written arguments of the parties, attendance in courts of persons confined or detained in prison, summary procedure for punishing a person found guilty of giving false evidence, procedure in certain cases of contempt of court, etc.

Some more common procedures will be discussed later in Chapter 17 (relating to decisions without complete trial), Chapter 18 {relating to preliminary objections to trial) and Chapter 22 (relating to recording of evidence and special rules of evidence).

16.2 Language of courts

The Constitution provides that until Parliament by law otherwise provides, all proceedings in the Supreme Court and in every High Court shall be in English language.[3] However, the Governor of a State may, with the previous sanction of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State; but this rule shall not apply to any judgment, decree or order passed or made by such High Court.[4]

The State Government may determine what shall be, for purpose of this Code, the language of each court within the State other than the High Court. [S. 272] This does not, however, mean that a witness cannot give his evidence in a language other than the court language; nor does it mean that the accused person cannot give his statement in a language different from the court language. In such cases where the language used by witness or the accused person is one other than the court language, procedures have been provided by Sections 277 and 281 for the recording of such evidence and statement. These provisions would be discussed later.[5]

In a case where the appellant appeared in person and argued his case in Hindi the Supreme Court had occasion to point out the difficulties experienced by it and to suggest that persons should be represented by lawyers arranged by the court, to save judicial time.[6]

3. *See*, Art. 348(1^7) of the
4. *See*, Art. 348(2.) of the
5. *See*, Chap. 19 and *infra*, para, rfi.io.
6. *Bhuwneshwar Singh* v. *Union of*

Proceedings to be held expeditiously, and not to be adjourned without special reasons

16.3

An important aspect of fair trial is the expeditious conduct of trial proceedings. Even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right it has been held[7] that it is implicit in the broad sweep and content of Article *zi* as interpreted by the Supreme Court in *Maneka Gandhi* v. *Union of India*[8]. Speedy trial, according to the Supreme Court, means reasonably expeditious trial.[9] It may be pertinent to note that in some cases further proceedings have been stopped by the judiciary because of the inordinate delay in trial.[10] As seen earlier,[11] the Code has given in this context a positive direction to all the criminal courts by enacting Section 309. The section reads as follows:

309. [12][(i) In every inquiry or trial, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the enquiry or trial relates to an offence under Section 376, Section 367-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of i86o), the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.]

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any enquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Power to postpone or

Cri Lj 3454.

7. ***Hussainara Khatoon (1)*** v. ***State of Bihar,*** {1980) 1 SCC 81: 1980 SCC (Cri) 23, 30-31: 1979 Cri Lj 1036.
8. (1978) 1 SCC 248: AIR 1978 SC 597.
9. ***Hussainara Khatoon (1)*** v. ***State of Bihar,*** (1980} 1 SCC Si: 1980 SCC (Cri) 23, 31: 1979 Cri Lj 1036. See also, ***Madheshwardhari Singh*** v. ***State of Bihar,*** 1986 Cri Lj 1771 (Pat); ***State*** v. ***Maksudan Singh,*** 1985 Cri LJ 1782; ***S. Gain v. Grindlays Bank Ltd.,*** (1986) 1 SCC 654: 1986 SCC (Cri) ***64:*** 1986 Cri LJ 255; ***Niranjan Hemchandra Sashittal*** v. ***State of Maharashtra,*** {2013) 4 SCC 642: (2013) 2 SCC (Cri) 737: 2013 Cri Lj 2143 surveying the case law and reiterating the Supreme Court's view of the right to speedy trial.
10. ***Union of India*** v. ***S.H. Mumtazuddin,*** 1988 Cri LJ 1320 (Cal); ***State*** v. ***Major P. F. Roberts,*** 1986 Cri LJ 1415 (Can); ***Rohtash Kumar*** v. ***State of Haryana,*** 1988 Cri LJ 1423 (PScH); ***Srinivas Gopa!*** v. UT ***of Arunacha! Pradesh,*** (1988) 4 SCC 36: 1988 SCC (Cri) 889: 1988 Cri LJ 1803; ***Kidbir Singh*** v. ***State of Punjab,*** T99T Cri LJ 1756 (P&H); ***N.V. Raghava Reddy*** v. ***Inspector of Police,*** 1991 Cri LJ 2144 (AP); C. ***Sivakumar*** v. ***State of A.P.,*** 1991 Cri LJ 2337 (AP); ***Raj Deo Sbarma*** v. ***State of Bihar,*** (1998) 7 SCC 507: 1998 SCC (Cri) 1692 and the cases referred to therein. ***See also,*** discussions in ***Akil*** v. ***State (NCT of Delhi),*** {2013) 7 SCC 125: (2013) 3 SCC (Cri) 63: 2013 Cri Lj 571; ***Thana Singh v. Central Bureau of Narcotics,*** (2013) 2 SCC 590: (2013) 2 SCC (Cri) 818: 2013 Cri Lj 1262; ***Thana Singh*** v. ***Central Bureau of Narcotics,*** (2013) 2 SCC 603; {2013} 2 SCC (Cri) 829.
11. ***See supra,*** para. 13.10.
12. ***Subs,*** by Act 13 of 2033 (w.e.f. 3-2-2013}.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

[13][Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:]

[14][Provided also that—

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

{b} the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a wdtness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.]

Explanation i.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation z.—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

First of all sub-section (i) gives a clear direction to every court in charge of criminal proceedings to conduct the same as expeditiously as possible. It then directs in particular that when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined. However, if the court considers it necessary to adjourn the case, it can do so after recording reasons for the same. The Code does not provide for any remedy if the general or particular direction given in sub-section (i) above is not followed by courts. The only limited provision is the one made by Section 437(6). That section enables the accused to get bail if he is in detention and his trial in the Magistrate's court is not completed within 60 days from the first date fixed for hearing.[13][14][15]

[14] [5]

The simple rule or principle underlying provisions like Section 305 is that once the cognizance of the accusations of a criminal nature is taken by the competent court, the trial has to be held with all expedition so as to bring to book the guilty and absolve the innocent. This has to be achieved

with speed and without loss of time in the interest of public justice.[16] The object is to avoid loss of evidence by passage of time and unnecessary harassment to the accused. It is well known that if the prosecution is kept pending for an indefinite or for a long time, important evidence may be obliterated by mere lapse of time with the result that the evidence w[T]ould not be available at the time of trial.[17]

Trial to be on day-to-day basis

16.3.1

In *Akil* v. *State*™, all the trial judges have been advised to follow- Section 309 scrupulously". In other words the Supreme Court desires the trial judges to conduct trial on a day-to-day basis in *de die in diem* until trial is concluded.

After taking cognizance of an offence the inquiry or trial can be postponed if the court finds it necessary or advisable to do so. Similarly, after the commencement of the trial the court may from time to time, adjourn the trial if it finds it necessary or advisable to do so. In both the cases, the court is required to record reasons. The court's discretion regarding postponement or adjournment is further restricted by the second proviso to sub-section (2) above. According to the proviso, when witnesses are in attendance, no adjournment or postponement shall be granted without examining them; and in case it becomes absolutely necessary to postpone or adjourn the case, the court will have to record *special* reasons for doing so.

The Code provides for an opportunity to an accused to give his say on the question of sentence.[19] As this should not lead to delay the third proviso to Section 309(2) clarifies that adjournment shall not be granted only for the purpose of enabling the accused to show cause against the sentence proposed to be imposed.

The proviso added to the section in 2009 empowers the court to reject unjustified request for adjournments. In certain circumstances it can do away with the examination of the witnesses.

In *Ramdeo Chauhan* v. *State of Assam*[20], the petitioner did not succeed in proving that he was aged below *16* years on the date of occurrence. As he was arrested on the date of occurrence itself it was immaterial whether the crucial date for reckoning the age of juvenility was the date of occurrence or date of arrest.

As regards the need for giving an opportunity to the convict for hearing on the question of sentence, the court reiterated its position thus:

1.6. *Ramkriskna Savjalaram Redkar* v. *State of Maharashtra*, 19 So Cri Lj 2.54, 255 (Bom).
17. *State of Maharashtra* v. *Rasiklal K. Mehta*, 1978 Cri Lj 809, Sio (Bom}; *Akil* v. *State (NCT of Delhi}*, {2015) 7 SCC 125; (2013} 3 SCC (Cri) 63: 2013 Cri LJ 571.
18. {201.3} 7 SCC 125: (2013) 3 SCC {Cri) S3.
19. *See*, Ss. 235(2) and 248(2). *See infra*, paras *19.7(h)* and 20.3 r.
20. {2001} 5 SCC 714.

(1) When the conviction is under Section 302 IPC (with or without the aid of Section 34 or 149 or 120-B IPC) if the Sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of sentence. Section 235(2) ... will not be violated if the sentence of life imprisonment is awarded for that offence without hearing the accused .....

(2) In all other cases the accused must be given sufficient opportunity of hearing on the question of sentence.

(3) The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day.

(4) In cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the Judge proposes to impose death penalty) the proviso to Section 309(2) is not a bar for affording such time.

(5) For any reason the court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences the convicted person shall be committed to jail till the verdict on the sentence is pronounced.

Under this section the court has power to impose "such terms as it thinks fit" on either party while granting an adjournment or postponement at its instance. The power to impose "terms" would, in theory, include a power to direct the payment of costs by a party whose conduct has necessitated the adjournment. Explanation 2 draws pointed attention of the courts to this power.[35]

The postponement or adjournment can be for such time as the court considers reasonable. What is reasonable time in a given case will depend upon the facts and circumstances of the case.

The discretion to postpone or adjourn the case is to be exercised judicially and not arbitrarily.

If the accused is in custody and the case is to be postponed or adjourned, the section empowers the court to remand the accused to custody. However if such a remand is ordered by a Magistrate, it can only be for a term not exceeding 15 days at a time. The Code makes a clear distinction between detention in custody before taking cognizance and detention in custody after taking cognizance. The former is covered by Section 167[21 22] and the latter by Section 309. The two are mutually exclusive and ought to be kept so.[21 22 23] The opening words of Section 309(2)—"If the court after taking cognizance of an offence or commencement of trial"—make it abundantly clear that the power to remand the accused to custody cannot be exercised during the police investigations. A question arose whether the Magistrate has power to remand an accused during the period between

21. *See,* 41st Report, p. 212, para. 24.62.
22. *See supra,* para. S.13.
23. *See,* 41st Report, p. 212, para. 24.49.
See, *Dinesb Dalmia* v. *C B I f* (2007) 8

the date of submission of police report and the date of taking cognizance. The Bihar High Court apparently following the Supreme Court's decision in *State of U.P.* v, *Laksbmi Brahma*[24] ruled that the Magistrate has power under Section 309 since inquiry in terms of Section *z{g)* of the Code could be deemed to have commenced from the submission of police report and continued till an order of commitment was made under Section 209.[23] Section 309(2} is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded.[26 27 28] In such a situation what is the purpose of Explanation 1 in Section 309 is not quite clear.[25] In any case, the explanation cannot override the provisions of Section 309(2) and it cannot be invoked for the purpose of remanding the accused to custody when the court has not taken cognizance of the offence.[25 26 27 28]

Under Section 309(2) after first taking cognizance of the offence the court may by warrant remand the accused if in custody, but that power of remand has to be read in the light of the right of entitlement of the accused to be released on bail once the period of 90 days or *60* days mentioned in Section 167(2){<Z) comes to an end.[29]

Section 309(2) empowers the court to remand an accused, if in custody, by a warrant, but if the court happened to be that of a Magistrate, the command of the Legislature is that the Magistrate shall not remand an accused person to custody for a term exceeding 15 days at a time.[30] The underlying principle seems to be that a Magistrate may not adjourn an inquiry or trial and remand an accused for a term exceeding 15 days at a time. This is a check on the power of the Magistrate although there is no such inhibition on the Sessions Court.[31] The custody in pursuance of an order of remand for a term exceeding 15 days made at a particular time becomes illegal and bad on the expiry of 15 days, if not from the date of the order.[32]

The court can pass an order of remand under Section 309(2) even if the accused is not present in court.[33] Indeed courts may find it necessary

24. *State of U.P.* v. *Laksbmi Brahman,* (1983) 2 SCC 372.: 1983 SCC (Cri) 489: 1983
25. *See,* observations in *Rabmdra Rai* v. *State of Bihar,* 1984 Cri LJ 1412 (Pat)
26. *Shambu Nath Singh* v. *State of Bihar,* 1987 Cri Lj
27. *Mata b6r Farida* v. *St33e of Orissa,* (1975) z SCC 220: 1975 SCC (Cri) 484: 1975 Cri Lj
28. *Mohd. Shaft* v. *State,* 1975 Cri Lj 1309 (Del).
29. *Babubhai Parsbottamdas Patel* v.
30. See, the first proviso to S. 309(2).
31. *Baku Narayan* v. *State,* 1972 Cri LJ 423, 425 (Pat) (FB).
32. *Ibid,* 426; see also, *A. Lakshmanarao v. Judicial Magistrate, First Class,* (1970} 3 SCC 501: 1971 SCC (Cri) 107, 109, 112: 1971
33. *Raj Narain* v. *Supt., Central Jail,* (1970) 2 SCC 750: 1970 SCC (Cri) 543, 547:

to order a remand in the absence of the accused, for example, when an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to court and in such case the order made without production of accused in court will not be invalid.[34]

This position in the context of Section 167 has come to be disputed in the light of the explicit provision in Section *i6y(z){b)* of the Code of 1973 requiring the production of accused before the Magistrate for remand.[33] Indeed, there is no similar provision in Section 309. The reason might be that during inquiry or trial the accused being under judicial custody may not have to be under police influence.

In Section 309 "remand" means remand to custody in a Magisterial lock-up or jail during a postponement or adjournment of an inquiry of trial.[36] Section 309 appears in Chapter XXIV of the Code which deals with inquiries and trials. Further the custody which it speaks of is not such custody as the Magistrate thinks fit as in Section 167(2), but only jail custody, the object being that once an inquiry or trial begins it is not proper to let the accused remain under police influence.[37] On the other hand the Gujarat High Court has held that on a true interpretation of Section 309 it must be held that the word "custody" which appears therein, is "police custody" as well as judicial custody.[38] The Gujarat case was decided under the old Code of 1898 and that decision might be considered plausible according to the working of Section 344 of the old Code (equivalent of Section 309 of the new Code) which was applicable even before the cognizance of the offence was taken. In view of the wording of new Section 309, it appears reasonable to restrict the meaning of the term "custody" to judicial custody only, and it is unlikely that the Gujarat decision will be followed in future.

Nothing contained in Section 309 derogates from the authority conferred by Section 209[39] on the court which commits an accused to

244; A. *Lakshmanarao* v. *judicial Magistrate, First Class,* (1970) 3 SCC 501: 1971 SCC (Cri) 107, 109, m: 1971 Cri LJ 2.53; *Urooj Abbas* v. *State of* U.P., 1973 Cri Lj 1458, 1460 .{All) (FB); *Narayana Reddy* v. *State of A.P.,* 1991 Cri Lj 630 {AP}; *see also,* d iscussions in *Ramesb Kumar Ravi v. State of Bihar,* 1987 Cri Lj 14S9 {Pat} on the Supreme Court rulings starting from the *Raj Narain case.* Also see, *R.K. Singh v. State of Bihar,* 1987 Supp SCC 335: 1988 SCC (Cri) 89; *Suhash* v. *State of MSP,,* 19S9 Cri LJ 1553 (MP) dealing with requirement of production of accused for remand order.

34. *Raj Narain* v. *Supt., Central Jail,* (1970} 1 SCC 750: 1970 SCC (Cri) 543, 547: 1971 Cri LJ 2.44. *Also see,* observations in *Ramesh Kumar v. State of Bihar,* 1987 Cri Lj 1489 (Pat).
35. *See,* discussions in *Ramesh Kumar* v. *State of Bihar,* 1987 Cri Lj 1489 (Pat); *Ramesh Kumar Singh* v. *State of Bihar,* 1987 Supp SCC 335: 19S8 SCC (Cri) 89; *Subash* v. *State of M.P.,* 1989 Cri Lj 1553 (MP).
36. *Kimjan Nadar, re,* 1955 Cri LJ 740, 746: AIR 1953 TC 74, 79; *State* v. G.C. *Rao,* 1974 Cri hi 142-4, 143i, 1453 (AP); *Ajit Singh* v. *State,* 1970 Cri Lj 1075: AIR 1970 Dei 154 (FB).
37. *Gouri Shanker Jha* v. *State of Bihar,* (1972) 1 SCC 564: 1972 SCC (Cri) 328, 333: 1972 Cri H 5°5, 5 JO-
38. *State of Gujarat* v. *Pramukhlal,* 1975 Cri Lj 324, 329 (Guj).
39. For the text of S. 209, *see supra,* para. 11.8.

Sessions Court to direct his being detained during and until conclusion of the Sessions trial. Once the detention of an accused during and until conclusion of the trial has been duly authorised it would not be necessary for the Sessions Judge to, every time he adjourns or postpones the trial, confer on any one such authority for detention of the accused.[40]

Decision on evidence partly recorded by one judge or Magistrate and partly by another

16.4

It is one of the important principles of the administration of criminal justice that the judge or the Magistrate who hears the entire evidence should give the decision. A departure from this principle has been permitted by Section 32.6 apparently on grounds of expediency. When a Magistrate after hearing a case is transferred or relinquishes his office for any other reason, his successor, but for Section 326, will have to hear the case afresh. Section 326 is intended to save the time, expenditure and harassment involved in trying the case afresh. Section 326 is as given below:

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another

326. (1) Whenever any [41] [judge or Magistrate], after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another [42] [judge or Magistrate] who has and who exercises such jurisdiction, the [43 44 45] [Judge or Magistrate] so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:

Provided that if the succeeding [44 45][judge or Magistrate] is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

{2) When a case is transferred under the provisions of this Code Mfrom one judge to another judge or from one Magistrate to another Magistrate], the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3} Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under Section 322 or in which proceedings

The cardinal principle of law in criminal trial is that it is a right of an accused person that his case should be decided by a judge or Magistrate who has heard the whole of it.[46] Section 326 is an exception to this cardinal

40. *Rajendra Go&ain* v. *Supi.. District Jail*, 1981 Cri LJ S02, 809 {Ail}.
41. *Stibs.* by Act 45 of 1978, S. 2.7 for "'Magistrate".
42. *Ibid.*
43. *Ibid.*
44. *Ibid.*
45. *Subs*, by *ibid* for "from one Magistrate to another Magistrate".
46. *Rarnadas Kelu Naik v. V.M. Muddayya*, 1978 Cri IJ 1043. 1044

principle. Therefore, except in regard to those cases which fall within the ambit of Section 326, a succeeding judge or a Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor; if he does so and thereby violates the principle, he would be doing something not being empowered by law in that behalf. Such an irregularity is not curable and the proceedings, according to Section 461[/][47], shall be vitiated.[48]

A criminal trial consists of two parts. The first part comprises the process of determining the guilt or innocence of the accused person and in case he is found guilty the second part of the trial becomes operative and decides as to the punishment or treatment of the offender. For the purposes of the abovementioned principle, these two parts of a criminal trial are to be treated as if each part is a separate and independent trial in itself. Therefore it has been held that when a case is remitted by the appellate court to the trial court for giving a hearing on the question of sentence under Section 235(2) or Section 248(2), there would be fresh evidence and the principle that "the judge or Magistrate may not act on evidence already recorded before his predecessor and must conduct a de novo trial" would not be violated.[49] In such a case it is not necessary to invoke the aid of Section 326,

In order to attract the provisions of Section 326, to enable a successor judge to continue a trial from the stage left by his predecessor, two conditions must be satisfied: *i)* that the first judge had heard and recorded the whole or part of the evidence and *it)* that he had ceased to exercise jurisdiction in the case. The expression "ceases to exercise jurisdiction therein" occurring in Section 326(1) points to the ceasing of jurisdiction in the inquiry or trial, and not to the designation of the officer.[50]

It is the right of an accused that his case should be decided by the judge who has heard and recorded the evidence. Section 326 being an exception to the abovesaid cardinal principle of criminal law in a criminal trial, the same will have to be construed strictly. Thus, unless the jurisdiction of the first judge to continue the trial is taken away expressly or by necessary implication either under a statutory provision or an order passed to that

Lj 205, 210 (AH).

47. According to S. 461:
If any Magistrate, not being empowered by law in this behalf, does any of the following things namely— *id)* **-* *ib)*
(c) tries an offender; [51lf]
his proceedings shall be void.

48. *Ramadas Keht Naik* v. *V.M. Muddayya*, 1978 Cri Lj 1043, 1044 (Kant).

49. *Nirpal Sitigh* v. *State of Haryana*, (1977) 2 SCC 131: 1977 SCC (Cri) 262, 277: 1977 Cri Lj 642,654.

50. *Punjab Singh* v. *State of U.P.*, 1985 Cri Lj 205, 211 (Ail).

effect by a competent authority, the judge shall continue to exercise the jurisdiction to continue a part-heard trial, and he would not be deemed to have been divested of it merely because a change has taken place in his designation. If this be not the true rule, successive changes in the designation of Additional Sessions judges would result in successive change of hands in the trial of part-heard cases, which does not seem to be the intention of the legislature behind the provisions of Section 32A[51 52 53 54 55 56 57 58]

The section is an enabling provision; and if the judge or Magistrate Is of the view that in the interests of justice the witnesses already examined by his predecessor should be again examined by him, he can do so according to the proviso to sub-section (1).

For good reason Section 326 does not cover "summary trials". Such trials should be decided quickly and no question of a "part-heard case" should normally arise. Also the record of evidence in a summary trial is scanty and in certain cases may be virtually non-existent. Therefore the rule in Section 326 ought not to apply to such trials.[52 53 54 55 56 57 58] However, if a court has tried an offence as summons case though it could have been tried summarily, Section 326(3) would not be applicable and the successor Magistrate can very well start the case from the stage where the predecessor left."[3] Sections 322 and 325 have been discussed earlier in para. 14.3, *supra.* Obviously in case of Section 322 it is not advisable to extend the principle contained in Section 326; and in case of Section 325 it is not necessary to do so as the principle is in a way incorporated in that section itself.

The section does not empower a Magistrate to write a judgment upon the arguments heard by his predecessor."[4] The Magistrate is also not empowered to deliver judgment written by his predecessor and forwarded by him from the place of his transfer.[33] The Madras High Court has however held that the succeeding Magistrate can sign and pronounce the judgment written by his predecessor. He would in that case be taken to adopt the judgment as his own.[36] The Kerala High Court has held that the judgment passed by a judge could be pronounced by another judge.[37] The section applies to courts of same category.[38]

The section applies not only where one Magistrate or judge is succeeded by another, but also where the second Magistrate or judge is in his turn

51. *Ibid, X J Z .*
52. *See,*
41st
53. *K. fayachandran* v. *O. Nargeese,* 1987 Cri Lj 1997 (Ker).
54. *fagarnath Singh* v. *Francis Kharia,* {1948} 49 Cri Lj 704: AIR
55. *Mohd. Kafique* v. *King Emperor,* (1926) 27 Cri Lj 406: AIR 1926
56. *Savarimuthu PHlai, re.* (1916) 17 Cri Lj 166. 167: ILR (1916) 40
57. *District and Sessions Judge, re,* 1986 Cri LJ 1966 {Ker}.
58. *Palanisamy Gounder, re,* 1987 Cri Lj 1970 (Mad).

succeeded by another Magistrate or judge. The third Magistrate or judge can act on the evidence recorded by his two predecessors.[59]

16.5 Power of the court to proceed against other persons appearing to be guilty of offence

It happens, sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is only proper that the Magistrate should have the power to call and join him in the proceedings.[60] Section 319 provides for such a situation and is as given below:

Power to proceed against other persons appearing to be guilty of offence

319. (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause *(a),* the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

The main purpose of the section is that the whole case against all known suspects should be proceeded with expeditiously, and convenience requires that cognizance against the newly-added accused should be taken in the same manner as against the other accused.[61] The section springs out from the doctrine *judex damnatur cum nocens absolvitur* (judge is condemned when guilty is acquitted).[62] The section assumes that the court proceeding under it has the power of taking cognizance of the new case.

In deciding the question as to whether summons simpliciter, bailable warrant or non-bailable warrant would be proper to secure appearance of person other than accused under Section 319, it was held in *Vikas* v. *State*

59.

60. See,

61. *See,*

62.

of Rajasthan[63] [64] [65] that the court should first issue summons simpficiter or bailable warrant, failing which it should issue non-bailable warrant. The discretion of court to issue non-bailable warrant should be exercised judiciously and sparingly with circumspection and not in a routine manner.

A plain reading of Section 319(1) which occurs in Chapter XXIV of the Code dealing with "general provisions as to inquiries and trials", clearly shows that it applies to all the courts including a Sessions Court and as such Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused.[63] [64] [65] [66] [67] Under Section 193[61] read with Section 2.09[66] [67] when a case is committed to the Court of Session in respect of an offence the Court of Session takes cognizance of the offence and not of the accused and once the Sessions Court is properly seised of the case as a result of the committal order against some accused the power under Section 319(1} can come into play' and such court can add any person as an accused as mentioned above.[6-']

A question as to whether before summoning an accused a Sessions Court should take any* evidence, has been raised.[68] [69] [70] [71] It has been answered in several decisions that the Sessions Court is entitled to summon accused on finding a prima fade case from the record of the case submitted with the committal order.[69] [70] [71] It has been categorically ruled that if there is material to proceed under Section 319(1) there is no necessity for postponing action under that section till some statement is recorded. '[0] The Bihar High Court has, however, added that the power of Sessions Court to summon additional accused in this context is independent of Section 3x9. Since in terms of Section 319 the power can be exercised "in the course of inquiry", it appears to be correct to locate this power for summoning in Section 319.[72]

63. {2.014) 3 SCC 32.1.

64.

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65. For S. 19 3. *see supra*, para. 10.4
66. For S. 209. *see supra*, para. 11.8.
67. *joginder Singh* v. *State of Punjab*, {1979) 1 SCC 345: 1979 SCC
68.

69.

70. *Dalip Singh* v. *State of Rajasthan*, 19S9 Cri LJ 600
71. *Sk. Lai fur Rahman* v. *State*, 1985 Cri Lj 1238 (Pat).
72.

While the response of various courts remained as discussed above, the Supreme Court have had occasions to express its views in several decisions. In *Kishun Singh* v. *State of Bikar*[7^], the court reiterated the view that the Sessions Court's power to summon additional accused is independent of Section 319. However, some reservations came to be expressed against this view by another two-member Bench of the Supreme Court in *Raj Kishore Prasad* v. *State of Bihar*[73 74]. Thus, again the question, whether the Court of Session has the power under Section 319 to arraign a new accused, prior to the evidence collection stage came to be reconsidered in *Ranjit Singh* v. *State ofPunjab*[7\] in the light of its decision in *Joginder Singh* v. *State of Punjab*[76]. In this case it was reasoned thus:

> Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked.[77 78]

In other words the evidence envisaged under Section 319 is the evidence led during trial if the offence is triable by the Sessions. The matter placed before the committal court cannot be treated as evidence collected during inquiry or trial.

The Supreme Court also added that if the Sessions Court is convinced that the police has not sent up a particular accused due to inadvertence or omission, he can send up a report to the High Court requesting it to direct the Magistrate under its revisional or inherent powers to issue process against that left-out accused. In taking this position the court presumably refused to follow its own decisions In *Nisar* v. *State of U.P.*[7S]

A five-member Bench of the Supreme Court in *Dharam Pal* v. *State of Haryana*[79 80] has upheld the ratio of *Kishun Singh* v. *State of Bihar** and declared that the Sessions judge has power to summon accused exonerated by the police under Section 193 of the Code. The Bench did not approve the ratio of *Ranjit Singh* v. *State of Punjab*[73 74 75 76 77 78 79 80 81].

The expression "any person not being the accused" in Section 319(1) means a person against whom no process has already been issued because if process has already been issued against a person the question of adding him as an accused in the case and proceeding against him as contemplated

73. (1993} 2
74. (1996} 4
75. (1
76. (1979) 1
77. *Ranjit*
78. (1995) 2
79. 2013 Cri
80. (1993) 2
81. (1998) 7

in that section will not arise at all.[82] The Supreme Court explained the meaning of "any person not being the accused" in Section 319, further in the *Gajendra Singh case,* as:

> The words 'any person not being the accused' in Section 319 would cover any person who is not already before the court in the case in which order under Section 319 is passed. It is the duty of the court to bring before it any person who appears £o have committed an offence and to convict and pass an appropriate order of sentence on proof of such person having committed the offence.[82 83 84 85]

It may be noted that the expression is not confined to persons who had been named in the FIR but not sent up by the police though such persons would also be included in the expression.[82 83 84] Similarly, in a warrant case instituted otherwise than on a police report the court in the course of the trial can order framing of the charge under Section 319 against persons who were earlier discharged at the inquiry stage of the case.[85] But the Supreme Court has ruled that a person who has already been discharged in the case should not be summoned.[86] It said:

> The provisions of Section 319 had to be read in consonance with the provisions of Section 398 of the Code.[87]

The word "evidence" in Section 319(1) read along with other provisions of this section means the statements of witnesses as recorded by the court, and the same would not include statements under Section 161 of witnesses recorded by the police, statements recorded under Section *164,* or statements recorded under Section zoz.[88] The "evidence" as mentioned in Section 319(1) must be sufficient to make out a prima facie case against such person and satisfy all essential ingredients constituting the offence for which he is sought to be prosecuted. However, the court at that stage is not called upon to evaluate or apprise the evidence with a view to assess

82. *Basudeo Mon dal* v. *Dud Kumar Prarnanick,* 19S2 Cri IJ 1654, 1655 (Cal).
83. *Gajendra Singh* v. *State of Rajasthan,* {1998) 8 SCC 612: 1998 SCC (Cri) 1608.
84. *Gunaram Tanti* v. *State of Assam,* 1983 Cri Lj 2 89, 290 (Gau); see also, *Joginder Singh* v. *State of Punjab,* (1979) 1 SCC 345:
85. *Mohanbhai Bhomraj* v. *State of Gujarat,* 1979 Cri
86. 2S105k3a(nPaLta)i. v. *Slate of Rajasthan,* (1990) 4 SCC 580: 1990 SCC (Cri) 650:
S7. *Ibid,* 2309 (Cri LJ).
88. *Hukamaram* v. *State of Rajasthan,* 1982 Cri Lj 2341, 2342 (Raj); see also, *Gunaram Tanti* v. *State of Assam,* 1983 Cri LJ 2S9. 290 (Gan); R.C. *Kumar* v. *State of A.P.*. 1991 Cri Lj 887 (AP);

whether the evidence is sufficient for his ultimate conviction.[89] Nor is it necessary to subject the person on whose statement the additional accused is summoned for cross-examination.[90]

Section 319 can be exercised by the court suo motu or on the application of someone including the accused already before him provided of course, it is satisfied that any person other than the accused has committed any offence for which he can be tried together with the accused. The exercise of the power is, however, discretionary with the court and the discretion must be exercised judicially having regard to the facts and circumstances of each case.[91] It has been opined that an accused cannot be added by the Magistrate at the stage of committal[92] and that addition can be ordered only by a court.[93]

Section 468 deals with bar to taking cognizance after lapse of the period of limitation. That section begins with the words "except as otherwise provided elsewhere in this Code" and Section 319 is one such exception. Therefore, the bar of limitation will not apply to a case where the court proceeds against a person under Section 319.[94 95] Moreover by legal fiction created by Section 319(4)(h), the case against the person added as accused is to proceed as if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced. Therefore, if at all Section 468 is applicable, the date relevant for reckoning the period of limitation would be the date when cognizance of offence was taken in the original proceeding and not the date when any person is added later as an accused under Section 319.

Once an order is made under Section 319 the person against whom that order has been made becomes an accused at the trial of that very case in which the order is made. All that is required is that the proceeding will have to commence afresh and witnesses reheard so that the aforesaid person may not suffer because of any proceedings taken in his absence and before he is arraigned as an accused. It is not, however, the object of the law that the person should have a trial separate from the one in which the order against him is made.[93 95] He can be tried after the trial of others.[96]

89. *Mobatt*
90. *See,* discus
91.
92. *K.S.*
93.
94.
95. *State* v.
96.

In this connection it is pertinent to note that an accused summoned under Section 315? cannot be punished for an offence which has not been taken cognizance of by the Magistrate against the other accused.[1][2][3][4][5]

The power conferred on the court by Section 319 is really an extraordinary power and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.[2][3] The Supreme Court reiterated this position in *Kajendra Singh* v. *State of U.Pd* EK. Balasubramanian J in his concurring opinion explained that the trial court has this power to be exercised depending upon the facts of each case and that "there is no rationale in fettering that power and the discretion, either by calling extraordinary or by stating that it will be exercised only in exceptional circumstances. It is intended to be used when the occasion envisaged by the section arises". Having regard to the decisions such as *Joginder Singh* v. *State of Punjab*[4], *MCD* v. *Ra?n Kishan Rohtagi*[5] discussed above, this reading of Section 319 seems to be correct. It has been held that evidence used for the satisfaction to invoke Section 319 by the court should not be of the standard used for convicting a person made an accused under that section.[6][7][8]

Questions regarding the interpretation of Section 319 have now been answered by a five-member Bench in *Hardeep Singh* v. *State of Punjab*[7][8] as follows:

Question No. I and No. Ill

I. What is the stage at which power under Section 319 CrPC can be exercised?

III. Whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

In *Dharam Pal* v. *State of Haryana*[s], the five-judge Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 CrPC and the Sessions judge need not wait till "evidence" under Section 319 becomes available for summoning an additional accused. Section 319 significantly uses two

1. *Annamma Cherian* v. *State of Kerala*, 1990 Cri LJ 1796 (Ker}.
2. MCD v. *Ram Kishan Rohtagi*, {19S3! *t* SCC 1: 19S3 SCC (Cri) 115, 122: 1983 Cri Lj
3. (2007) 7 SCC 378: (2007) 3 SCC (Cri) 375.
4. (1979) 1 SCC 345: 1979 SCC (Cri) 295: 1979 Cri Lj 333.
5. (1983) T SCC 1: 1983 SCC (Cri) 115: 1983 Cri Lj 159.
6. *Paulose* v. *State of Kerala*, 1990 Cri LJ
7. {2014) 3 SCC 92.
8. (2014) 3 SCC 306.

expressions that have to be taken note of, *i.e.* 1) inquiry, and 2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 CrPC and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in column 2 of the charge-sheet. In view of the above position the word "evidence" in Section 319 has to be broadly understood and not literally *i.e.* as evidence brought during a trial.

Question No. II.—Whether the word "evidence" used in Section 319(1} could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

Considering the fact that under Section 319 a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4} the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. IV.—What is the nature of the satisfaction required to invoke the power under Section 319 to arraign an accused? Whether the power under Section 319(1} can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Though under Section 319(4)^} the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that the materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of trial, therefore the degree of satisfaction for summoning the accused (original and subsequent} has to be different.

Question No. V.—Does the power under Section 319 extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can

be summoned under Section 319 provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned, the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh.

. The court's reasoning becomes clear from its discussions in paragraphs 74, 75 and 77 extracted below:

> 74. An inquiry can be conducted by the Magistrate or the court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case.
>
> 75. Though the facts so received by the Magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 CrPC it is an information of complicity. Such material therefore, can be used even though not an evidence in *stricto sensu,* but an information on record collected by the court during inquiry itself as a prima facie satisfaction for exercising the powers as presently involved.
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> 77. ...The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused.

Power of court to summon any material witnesses and to examine persons present

16.6

In a criminal case, the fate of the proceeding cannot always be left entirely in the hands of the parties. The court has also a duty to see that essential questions are not so far as reasonably possible, left unanswered.[3] The provisions of Section 311 are intended to serve this purpose. Section 311 reads as follows:

> 311. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any such person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

Power to summon material witness. or examine person present

The section is intended to be wide as the repeated use of the word "any" throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word "may" in the first part and of the word "shall" in the second firmly establishes this difference. Under the first part, which is permissive, the court *may* act in one of three ways: *a)* summon any [9]

9. *Raghimandan* v. *State of U.P.,* (1974) 4 SCC 186: 1974 SCC (Cri) 355, 358: 1974 Cri Lj 453-

person as a witness, b} examine any person present in court although not summoned, and c) recall or re-examine a witness already examined. The second part is obligatory and compels the court to act in these three ways or any of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the court arising from the stage to which the trial may have reached, provided the court is bona fide of the opinion that for the just decision of the case, the step must be taken.[10] The requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.[11] In certain cases witnesses can be recalled and the parties or the counsel asked to pay up the cost.[12]

The ground on which the court may act under the second part of the section is one "essential to the just decision of the case". But those under the first part are not limited to that only. The only thing is that the court has to form a bona fide opinion as to the necessity of an order under Section 311. What is sufficient for that necessity cannot be enumerated exhaustively or with any precision. That will depend upon the facts and circumstances of each case.[13][14][15][16][17] The paramount consideration is doing justice to the case and not filling up the gaps in the prosecution or defence evidence.[14][15] When the trial court after having failed to take the recovery mahazars under Section 27, Evidence Act, recalled the investigating officer after the conclusion of evidence with a view to re-examining him to prove the recovery statement, the High Court declared it to be a step that may result in miscarriage of justice.[13] Similarly in a case where the prosecution failed to examine its witnesses promptly its request for recalling witnesses was not acceded to.[16][17] The section does not empower the court to summon documentary evidence.[57]

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11. *Ja matra j Kewa lji Gova*
12. *Abhok Kum ar a.*
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14. *Kama ! Oil*
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Ordinarily a court may intervene under Section 311 after close of evidence, for it may not be possible for the court to form a bona fide opinion as to the necessity of calling a witness before evidence is closed on the side of the prosecution at least. There is nothing, however, in the language of Section 311 to say that the court cannot make an order under Section 311 even before the prosecution evidence is closed.[18] But a witness, whose examination, cross-examination and re-examination, are not over, cannot be called under Section 311, whatever the stage. In such a situation, the court may, however, act under Section 165, Evidence Act, if necessity, for justice, arises.[19] It has been held that a witness cannot be tendered for cross-examination alone.[20] If he was not examined in chief, he cannot be subjected to cross-examination.[21]

The trial of a criminal case comes to an end only after pronouncement of the judgment. Therefore the court can summon and examine any witness as a court witness at any stage till it pronounces the final judgment.[22] [23]

The section is wide enough to apply to all courts—original, appellate or

22

revisional.

The potential for abuse of Section 311 could be gleaned from P.M. *Abubacker* v. *P.J. Alexander*[24] [25] wherein after allowing the compounding by an accused, court's power under Section 311 was sought for to summon him as a witness with a view to implicate another in the case.

In yet another case three prosecution witnesses filed affidavits denying prosecution story and the evidence given by them in the court. On application for recalling them the Allahabad High Court said that though the court has power to recall them it should not be done in the present case as it would violate Section 145, Evidence Act.[22] [23] [24] [25] [26] [27]

A witness called by the court under Section 311 can be cross-examined by both the prosecution and the defence.[26] [27] When a court examines a witness it is for the court to say after such questioning as to which of the parties will be permitted to ask questions first and to what extent.[2n]

When a witness examined by the court is questioned by the parties, it cannot strictly be said that he is cross-examined. For cross-examination is

18. *Ketual Gupta* v.
19. Moktz *Kumar* v. *State o f W . B* 1975 Cri Lj 838. 841 (Cal).
20. *Sukhwant Singh* v. *State of Punjab,* (1995) 3 SCC 367: 1995
21. *Tej Parkash* v. *State of Haryana,* (1996} 7 SCC 322.: 1996 SCC
22. *Aeltemesh Rein* v. *State*
23. *jarnail Singh* v. *State of Punjab,* 1990 Cri Lj 2310 (P&H).
24. 2000 Cri Lj 1168 (Ker).
25. *Tahir* v. *State of U.P.,* 2000 Cri Lj 1342 (All).
26. *Rangaswami \\ Muruga,* 1954 Cri Lj 123: AIR 1954 Mad 169; *Emperor v. Pita,* ILR
27. *Mukti Kumar* v. *State of* W.B., 1975 Cri LJ 838, 840 (Cal).

examination of a witness by the adverse party. When a court calls a witness he does not become a witness called by any party to the litigation.[25]

Section 311-A (as inserted by Act 2.5 of 2005] authorises the Magistrate of the First Class to direct any person including an accused who has at sometime been arrested to give specimen signatures or handwriting. Section 311-A enacts:

Power of Magistrate to order person to give

> 311-A. If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting.
>
> Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

At rhe stage of investigation the new Section 54-A lays down that the court can ask the person to be available for identification. Section 311-A also authorises him probably at the trial stage to demand his cooperation for "investigation".

16.7

Court's power to order payment of expenses of complainants and witnesses

Expenses of complainants and

The administration of justice, particularly in criminal matters, being the function of the State, it is reasonable to expect the State to pay the expenses of the complainants and witnesses. Section 312 empowers the court to order such payments. The section reads as follows:

> 3x2. Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

The word "witness" appearing in the section includes both prosecution [28] [29] [30] [31]

28. *Ibid.*
29. ***K.***
30. *ibid.*
31. ***Jadu moniv.***

Court's power to have local inspection

16.8

For the purpose of properly appreciating the evidence given at the inquiry or trial, Section 310 empowers the court to visit and inspect any place. Section 310 is as given below:

Local inspection

310. (1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

{z} Such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desires, a copy of the memorandum shall be furnished to him free of cost.

The judge or the Magistrate making the local inspection is required to record without delay "a memorandum of any relevant facts observed at such inspection".

While it may not always be possible to draw a sharp distinction between "relevant facts" and impressions or opinions formed by a judge at a local inspection, the requirements of the section are fairly clear.[32] It is clear from the section itself that certain safeguards have been provided by the legislature to avoid any controversy regarding the actual observation made by the judge or the Magistrate at the time of local inspection. The section provides that the inspection should be made after due notice to the parties and the judge or the Magistrate must record a memorandum of the relevant facts observed at such inspection without unnecessary delay. The section also requires that such memorandum shall form part of the record of the case and copies thereof shall be furnished to the parties if they so desire.[33]

The wording of the section is very wide and it does not limit the powers of the judge or the Magistrate to visit and inspect a place only after the evidence is recorded and not before. However, these powers can be exercised and local inspection made only if the judge or the Magistrate is of the opinion that the same is necessary for the purpose of properly appreciating the evidence given at such inquiry or trial. It obviously depends on the facts and circumstances of each case whether the judge or the Magistrate should exercise his discretion to visit and inspect the place at a particular stage.[34]

The judge or the Magistrate is not entitled to allow his view or observations to take the place of evidence because such view or observations of his could not be tested by cross-examination and the accused would

32. *See,* 41st Report, p. 355, para. 46.5.
33. *Abdul Karim* v. *Slate of Maharashtra,* 1974 Cri LJ 514, 516 (Bom).
34.

certainly not be in a position to furnish any explanation in regard to the

same.[35 36]

It may be noted that the section permits a Magistrate to make a local inspection and *not a local inquiry.* A local inspection is permitted only for the purpose of properly appreciating the evidence in the case and it cannot be allowed to take the place of evidence. While making a local inspection, a Magistrate should avoid making inquiries from the people on the spot with regard to the truth or otherwise of the matter in dispute.[36]

An omission to record any relevant facts that may be observed by a Magistrate at the inspection made under Section 310 is not an illegality vitiating the whole trial but is an irregularity which can be remedied under Section 465 of the Code. This was the view expressed by the Bombay, Gujarat, Allahabad, Madras, Nagpur and Oudh High Courts.[37 38] However according to the Calcutta High Court it is mandatory on the part of the Magistrate to have prepared a memorandum of relevant facts observed by him at such inspection, and the defect could not be cured even if there was no prejudice.

16.9 Court's power and duty to examine the accused person

With a view to give an opportunity to the accused person to explain the circumstances appearing in evidence against him, Section 313 provides for the examination of the accused by the court. This is of immense help to the accused person, particularly when he is undefended. It should also be remembered that most of the accused persons are poor, uneducated and helpless. As observed by Stephen, an ignorant, uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustained attention or systematic thought and the criminal trial proceedings which to an experienced person appear plain and simple, must be passing before the eyes and mind of the accused like a dream which he cannot grasp.[35 36 37 38 39] Under these circumstances the importance of Section 313 is self-evident; it requires the courts to question the accused properly and fairly so that it is brought home to the accused in clear words the exact case that the accused will

35. *Pritam Singh* v. *State of*

36. P.

37. *Manik chand* v. *State of Mahar*

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39. *See,*

have to meet, and thereby an opportunity is given to the accused to explain any such point.[40] This part of the trial is of utmost importance, and if as a result of any inadvertence or on account of undue haste on the part of the judges in zeal of completing the trial soon, if the examination of the accused under Section 313 is not properly done in its true and fair spirit the possibility of the trial court doing injustice cannot be ruled out.[41] In a case where 2,9 accused were to be examined, the Sessions Judge, purporting to record their answers, made a short shrift of the whole solemn affair by recording a monolithic answer: "same as accused 9" to each and every question. The Bombay High Court deprecated this way of recording accused's statement under Section 313.[42] Section 313 reads as follows:

313. (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—

(a) may at any stage, without previously warning the accused, put such questions to his as the Court considers necessary;

(.b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

Power to examine the accused

(2) No oath shall be administered to the accused when he is examined under sub-section (i).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. ...

The section, for a moment, brushes aside all counsel, all prosecutors, all witnesses and all third persons. It seeks to establish a direct dialogue between the court and the accused for the purpose of enabling the accused to give his explanation. The section, however, should not be regarded as authorising an inquisitorial interrogation of the accused.[43 44 45] Nor is it necessary to put each and every piece of evidence to him.[44 45] The section is not intended to enable the court to cross-examine the accused for the purpose of trapping him or beguiling him into an admission of a fact which the prosecution has failed to establish.[4-1]

40. ***Parichhat*** v. ***State of M.P.,*** (1972) 4 SCC 694: 1972 Cri
41. *Surendraprasad* v. *State of Gujarat,* 1980 Cri Lj 1016
42. *Dadasaheb Patalu Misal* v. *State of Maharashtra.* 1987
43. ***See***, 41st Report, p. 204, para. 24.40.
44. ***Dida/ Nayek*** v. ***State,*** 1987 Cri LJ 1561 (Cal).
45. P. ***Murugan*** v. ***Ethirajammal***, 1973 Cri Lj 1256, 1257

The relative evidentiary value of statements recorded under Sections 315 and 313 came to be examined by the Supreme Court in *Dehal Singh* v. *State of* H.P,[46] The statement made under Section 313 is recorded by the court without administering oath and the witness without being cross-examined. Naturally, it does not come under Section 3, Evidence Act as evidence. But, if an accused is examined under Section 315, the statement becomes relevant under Section 3 of that Act.

Sub-section (1) of Section 313 consists of two parts. Clause *(a)* gives a discretion to the court to question the accused at any stage of an inquiry or trial without previously warning him. Under clause *(b)* the court is required to question him generally on the case after the witnesses for the prosecution have been examined and before he is called for his defence. Clause {b} is mandatory and imposes upon the court a duty to examine the accused at the close of the prosecution case in order to give him an opportunity to explain any circumstances appearing against him in the evidence and to say in his defence what he wants to his own words.

However, in a *summons case*[47] where the court has dispensed with the personal attendance of the accused[48] the court gets a discretion under the proviso to dispense with the examination of the accused person under clause

(b) to sub-section (1). In a case where the accused assured that he would not complain about any prejudice on the ground of non-examination, the Supreme Court permitted him to avoid examination by the court.[49 50]

The accused is not bound to answer the questions, and according to sub-section (3) he shall not render himself liable to punishment by refusing to answer the questions or by giving false answers to them. Sub-section {a} makes it dear that no oath is administered to him. The reason is that when he is examined under Section 313, he is not a witness. Under subsection (4) the answers given by the accused may be taken into consideration in the inquiry or trial. The answers may be put in evidence for or against him in other inquiries or trials for other offences. For instance, if in a trial for murder he says that he concealed the dead body and did not kill the victim his statement may be used as evidence against him in a subsequent trial for an offence under Section 201, Penal Code, i860 (IPC).[50]

The mode of applying the section would vary with the knowledge, intelligence and experience of the judge. If in particular case the judge

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exceeds the permissible limits and subjects the accused to an inquisitorial examination, the superior courts will correct the error. The words "question him generally" in Section 313(1 *)(b)* and "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him" in Section 313(1) are clearly intended to prevent unfair interrogation of the accused person.[51] [52] Inadequate examination may vitiate the proceedings.->[2] Sometimes the accused is not asked about his motive, it may be prejudicial to him.-'"[3] [54] [55] Failure of the court to put a question under Section 313 on a relevant matter might result in exclusion of that information from evidence.[34]

The word "personally" in Section 313(1) indicates clearly that for the purpose of Section 313 the court cannot examine the pleader on behalf of the accused person. Instead written statements of the accused can be filed.[33] Arguing that the provisions in CrPC such as Sections 2.43(1) and Z47, 235(2) enabling accused's written statement to be acceptable, the Supreme Court in *Key a Mukberjee* v. *Magma Leasing Ltd.*[5]& has ruled that an accused can the examined through his counsel provided the following guidelines are followed:

> If the accused who is already exempted from personally appearing in the court makes an application to the court praying that he may be allowed to answer the questions vAthout making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:
>
> (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.
>
> (b) An assurance that no prejudice would be caused to him, in any manner by dispensing with his personal presence during such questioning.
>
> (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

If the court is satisfied of the genuineness of the statements made by the accused the said application and affidavit, it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the [51] [52] [53] [54] [55] [56]

51. See, 41st Report, p. z06, para. Z4.44.
52. ***Rajendra*** v. ***State of Rajasthan,*** 1996 Cri Lj 340 (Raj); see also, *Rautu Bodra* v. *State of Bihar,* 1999 SCC (Cri) 1319.
53. *Suresh Chandra Bahri* v. *State of Bihar,* 1995 Supp (1) SCC 80:
54. *Rautu Bodra* v. *State of Bihar,* 1999 SCC (Cri) 1319.
55.
56. (z00S) 8 SCC 447: (z008) 3 SCC (Cri) 537: z008 Cri Lj 2597.

sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning.

The question whether the examination of the accused under Section 313 was essential when the attendance of accused is dispensed with by the court under Section 2.05(1) and Section 317 of the Code came before the Supreme Court in *Usba* X. *Pillai* v. *Raj K. Srinivas*[51]. The court declared that in a warrant case (where the offence is punishable with death, imprisonment for life or imprisonment for a term exceeding two years) even if the court has dispensed with the personal attendance of the accused under Section 205(1) or Section 317, the court cannot dispense with the examination of the accused under clause *(b)* of Section 313 because such examination is mandatory.

The courts are expected to take care to put ail the relevant material circumstances appearing in evidence to the accused so as to enable him to say in his defence what he wants, in respect of the prosecution case and explain any circumstances appearing in evidence against him.[5x] It is not sufficient compliance with the section to generally ask the accused that, having heard the prosecution evidence what he has to say about it. The accused must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining the circumstances which appear against him and the questions must be fair and must be couched in a form which an ignorant or illiterate person may be able to appreciate and understands[9] If the questions put to the accused are unusually longish and take in their sweep a number of circumstances appearing against the accused from the prosecution evidence, the possibility of the accused being misguided cannot be ruled out.[57 58 59 60] The statements [57 58 59 60]

57. {1995} 3
58. *Ajit Kumar Cbau*
59. *Ajmer Singh* v. *State of*
60.

made by the accused under Section 313 should be read as a whole. Such a statement should not be dissected and considered only in part where the part is inextricably connected with the other part which is not taken into consideration. [61] A statement under Section 313 cannot be split into various parts and the favourable parts made use of as proof of the guilt of the accused on the basis of the alleged admission.[62 63] However, relying on the decision in *Nisbi Kant Jha* v. *State of Bihar*[6,3], it has been held that in case, the court finds the exculpatory part of the statement to be inherently improbable, there is no reason why the other part of the statement, which implicates the accused and which the court sees no reason to disbelieve, should not be accepted.[64 65 66]

A statement of the accused person under Section 313 is not substantive evidence, and therefore a conviction cannot be based on such a statement alone/[0] However such statement may, according to Section 313(4), be taken into consideration at the trial. The result is, the courts are not precluded from deriving assistance from the statement of the accused under Section 313 and consider it not in isolation but in conjunction with the evidence adduced by the prosecution/[6] An evasive answer to a question concerning a fact adduced in evidence might help the court to appreciate the evidence/[7] It is the duty of the accused to explain the circumstances against him/[8]

Even when he does not take a plea in the statement, still the court could take note of it. In *Kashiram* v. *State ofM.P,*[69], the Supreme Court reiterated the law that even if plea of private defence is not specifically taken by the accused in their statements under Section 313 and the injured accused did not enter in the witness-box, such plea can be raised during the course

1991 Cri LJ 2632 (Kant).

61. *State* v. *Dwari Behera,* 1976 Cri LJ 262, 270 (Ori); *Dadarao* v. *State of Maharashtra,* {1974} 3 SCC 630: 1974 SCC {Cri} 120, 123:
62. *State of Gujarat v. Acharya D. Pandey,* (1970} 3 SCC 183: 1971 SCC (Cri) 1, 3: 1971 Cri LJ 760; V.P.S. *Mohammed* v. *CCE,* 1973 Cri LJ 1551, 1553 (Ker); *Mohan Singh* v. *Pram Singh,* {2002) 10
63. {1969) 1 SCC 347:1969 Cri LJ 671.
64. *Mohan Lai* v. *A jit Singh,* {1978} 3 SCC 279: 1978 SCC (Cri) 378: 1978 Cri LJ 1107.
65. *State* v. *Dwari Behera*, 1976 Cri LJ 262, 270 (Ori); *Dharnidhar* v. *State of V.P.,* {2010} 7 SCC 759: {2010} 3 SCC (Cri) 491,
66. *Jammu Municipality* v. *Puran Prakash,* 1975 Cri LJ 677, 678-79 (J&K). See also, *A.K. Alt* v. *C.H. Marnmuty,* 1989 Cri LJ 1820 (Ker); *Kantilal Shwabhm Thakkar* v. *State of Gujarat,* 1990 Cri IJ 2500 (Guj); *Kalekhan* v. *State* ofM.P., 1990 Cri LJ 1119 (MP); *State of U.P.* v. *Lakhmi,* {1998) 4 SCC 336: 1998 SCC (Cri) 929; *Musheer*
67. *Rattan Singh* v. *State ofH.P.* , (1997) 4 SCC161 : 1997 SCC (Cri) 525: 1997 Cri LJ 833; *Brajendrasingh* v. *State of M.P.,* (2012) 4 SCC 289: (2012) 2 SCC (Cri) 409: 2012 Cri LJ 1883. See also, *Aftab Ahmad Anasari* v. *State of Uttaranchal,* (2010} 2 SCC 583: (2010) 2 SCC (Cri) 1054; *Santosh Kumar Singh* v. *State,*
68. *Neel Kutnarv. State of Haryana,* (2032) 5 SCC 766: {2012,) -3 SCC (Cri) 271; *Ravi Kapur* v. *State of Rajasthan,* {2012} 9 SCC 284.

of submissions by relying on probabilities and circumstances of the case and it can be considered by the court if made out from the evidence on record.

Non-explanation of the accused's injuries itself may not be sufficient to discard the prosecution case though the investigating officer should have atleast made an effort at investigating the cause of injuries of the accused.

While examining the accused under Section 313, every incriminating circumstance appearing from the prosecution evidence must be put to the accused. If any such incriminating circumstance is not put to the accused to enable him to explain it* the same cannot be permitted to be used against him.[70] But it is for him to bring the failure to the notice of the court.[70 71]

It has been held that when there was no mention of the person as accused by any one of the prosecution witnesses, his statement under Section 313 cannot be accepted or acted upon as the very examination of the accused under Section 313 was uncalled for inasmuch as there was no circumstance against him to be explained by him.[72]

It has been reiterated by the Supreme court that it is the duty of the court to examine the accused as per law. It is, however, open to the prosecution to invite the attention of the court, if any incriminating circumstance is left out and not put to the accused.[73 74 75]

It is well-settled that every error or omission in complying with Section 313 does not necessarily vitiate the trial. Errors of the type fall within the category of curable irregularities and the question whether the trial has been vitiated depends in each case upon the degree of error and upon whether prejudice has been or is likely to have been caused to the accused.[74 75] Non-examination of accused under Section 313 is irregular and it may vitiate the trial in certain circumstances.

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In a case where additional evidence was taken under Section 391 after recording the accused's statement under Section 313, the Supreme Court found that the accused was prejudiced as he did not get opportunity to explain his position against the additional evidence. The court, therefore, ordered retrial from the stage of recording statement under Section 313.[76]

Record of examination of accused

16.10

Section 2,81 relates to the mode of recording the examination of the accused and the language of such examination and of the record. It applies to Metropolitan Magistrates and other Magistrates and also to the Courts of Sessions. A separate rule has been made in respect of High Courts by Section 283 which provides that every High Court may, by general rule, prescribe the manner in which the examination of the accused shall be taken down in cases coming before it. The original criminal trials before the High Courts are, however, very rare. Section 281 is as follows:

Record of examination of accused

2.81. (i) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(z) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

Sub-section (6) clearly provides that the elaborate procedure for the recording of the accused's statement shall not apply to summary trials.

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are adopted and considering the objectives of such trials, this appears to be reasonable.

According to sub-section (i) the Metropolitan Magistrate is required to make a memorandum of the substance of the examination of the accused. If such memorandum is not prepared, it would vitiate the trial.[77 78]

Any Magistrate other than a Metropolitan Magistrate or the Sessions Judge is required to record in full the whole of such examination including every question put to him and the answer given by him. This is important because a statement made in answer to a question, if considered without such question, may sometimes carry a different meaning and would be, to an extent, misleading. However, failure to record the statement in the form of questions and answers is a defect curable under Section 463[5] provided that the error has not prejudiced the accused in his defence. But Section 463 will not apply if the questions were not put at all.[77 78 79]

Under sub-section (5) the accused is required to sign the record. If he refuses to do so, he is punishable under Section 180 IPC.

16.11 Accused person can be a competent witness

According to the provisions of Section 315, the accused can be a competent witness for the defence and can give evidence in disproof of the charges made against him or against his co-accused. Section 315 is as given below:

Accused person to be competent

315. (r) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that—

(a) he shall not be called as a witness except on his own request in writing;

(.b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

(z) Any person against whom proceedings are instituted in any Criminal Court under Section 98, or Section 107, or Section 108, or Section 109, or Section no, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

The section, as it exists, has been considered obscure in some respects.

> Are the words 'in disproof of the charges' intended merely to prevent the accused from implicating other co-accused? Or do they also shut out cross- examination of the co-accused as to the *main offence?* The position in this respect appears to be somewhat obscure. It is also not clear as to what is the scope of the cross-examination of the accused when he offers himself as witness. Can questions regarding his character or impeaching his credit be put in cross-examination? If such questions are permissible, to what extent he can be questioned in respect of previous convictions? All these matters may prove to be controversial. "

The Supreme Court in its decision in *People's Insurance Co. Lid.* v, *Sardar Sardul*[u] has clarified the position to some extent. According to the court, when a person accused along with others voluntarily steps in the witness box as a witness in defence, he is in the same position as an ordinary witness and is, therefore, subject to cross-examination by the prosecution counsel and evidence brought out in such cross-examination can be used against his co-accused. If such a witness incriminates his coaccused, the other accused jointly tried with him has the right to cross- examine him if he wants to do sod[2] It has been suggested that when the accused person chooses to become a defence witness under Section 315, he waives his rights as an accused and subjects himself to the same rules applicable to other witnesses, in a case after getting his statement recorded under Section 313, the accused got himself examined as a witness under Section 315. His request to produce certain documents was, however, turned down by the trial court.[80 81 82 83] The Supreme Court did not approve of this refusal and observed;

> Once the learned Judge allowed his application and commenced examining him as a defence witness, we fail to see why he took the attitude of not permitting the witness to produce the documents on which he relied.[84 85]

The court remanded the case to the Sessions.

Failure of the accused person to give evidence shall not be made the subject of any comment by any of the parties or the court, or give rise to any presumption against himself and the other co-accused.[s]- This is pretty clear from clause {b} of the proviso to Section 315(1). [80 81 82 * 84 85]

80. See, 41st Report, p. zn, para. 2,4.56.

81. {1962} 1 Cri Lj 45**X:** AIR 1962 Puni 101; see also *Jibachh Shahv. State.* {1965) 2 Cri Lj 235: AIR 1965 Pat 331.

82. ***Tribhuvan Nath*** v. ***State of***

S3. ***Gajendra Singh*** v. ***State of Rajasthan,*** (1998) 8 SCC 612: 1998 SCC (Cri)

84. *Ibid.*

85. *Baidyanaih Prasad Srivastava* v. *State of Bihar*, 1968 Cri Lj 1650, 1652: AIR.

16.12 No influence to be used on an accused person to induce disclosures

Section 316 provides as follows:

No influence to be used to induce disclosure

316. Except as provided in Sections 306 and 307/00 influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

Sections 306 and 307 referred to above deal with tender of pardon to an accused person. The pardon is granted for disclosing the truth relating to the offence with which the accused person (receiving the pardon) was connected.

16.13 Oral and written arguments

The practice of advancing arguments after the close of the evidence has been given statutory recognition by Section 314 which reads as follows:

Oral arguments and memorandum of arguments forth

314. (r) Any party to a proceeding may, as soon as may be, after the close of his evidence, address concise oral arguments, and may, before he concludes the oral arguments, if any, submit a memorandum to the Court setting

concisely and under distinct headings, the arguments in support of his case and every such memorandum shall form part of the record.

(z) A copy of every such memorandum shall be simultaneously furnished to the opposite party.

(3) No adjournment of the proceedings shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

(4) The Court may, if it is of opinion that the oral arguments are not

The section not only allows oral arguments of the parties but makes a specific provision enabling the parties to hie written arguments. The provision allowing written arguments is considered necessary and desirable as it would enable the counsel to present his arguments cogently and to ensure that the court considers all the arguments advanced by hxm.[86]

The section directs that the arguments should be concise; and if they are not concise or relevant, it empowers the court to regulate them.

Normally no adjournment is to be granted for the purpose of filing the written arguments; and such arguments are to be hied before the oral arguments are concluded. A copy of the written arguments is to be furnished to the opposite party.

The prosecutor will have to submit his arguments after the conclusion of the prosecution evidence and before any other steps in the proceeding, including the personal examination of the accused, is taken. [86]

86. *See,* joint Committee Report, p, x

Attendance of persons confined or detained in prisons before criminal courts

16.14

Sections *26j* to 271 deal with securing the attendance of persons confined or detained in prisons before the criminal courts. They lay down certain conditions and circumstances under which such persons are to be produced before the courts. The provisions contained in these sections have been made on the lines of the provisions of the Prisoners (Attendance in Courts) Act, 1955.[87]

For the purposes of Sections 267 to 271, the term "detained" includes detained under any law for preventive detention; and the term "prison" includes

(i) any place which has been declared by the State Government, by general or special order to be a subsidiary jail;

{it} any reformatory, Borstal institution or other institution of a like nature. [S. *266]*

Section 267 empowers the court to require the attendance of a prisoner for answering to a charge of an offence or for examining him as a witness. It is not violative of Article 21.[85] It has been held that a prisoner may not be released for investigation under this section.[87 88 89]

However in a case where the proceedings are not in actual progress, an accused can be reasonably sent for the purposes of another investigation, committal proceedings or trial.[87 88 89 90] The section reads as follows:

267. (1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court,—

(a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or *{b)* that it is necessary for the ends of justice to examine such person as a witness,

the Court may make an order requiring the officer in charge of the prison to produce such person before the Court for answering to the charge or for the purpose of such proceeding or, as the case may be, for giving evidence.

(2) Where an order under sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded to, or acted upon by, the officer in charge of the prison unless it is countersigned by the Chief judicial Magistrate to whom such Magistrate is subordinate.

(3) Every order submitted for countersigning under sub-section {2} shall be accompanied by a statement of the facts which, in the opinion of the

Power to require attendance of prisoners

87.

88. C. *Natesan* v. *State ofT.N.*, 1999 Cri Lj 1382 (Mad).
89. *Bbarti Sachdeua* v. *State,* 1996 Cri Lj 2102 (Raj).
90. *Ranjeet Singh* v. *State of U.P.*, 1995 Cri LJ 3305 (All)

Magistrate, render the order necessary, and the Chief Judicial Magistrate to whom it is submitted may, after considering such statement, decline to countersign the order.

Section 268 creates an exception to Section 267 above. It empowers the State Government to exclude certain persons from the operation of Section 267 and it cannot be used to detain a person in prison for which specific orders are necessary.[91] Section 268 is as given below:

'Power of State Government to exclude certain persons from operation of Section ***267***

268. (1) The State Government may, at any time, having regard to the matters specified in sub-section (2}, by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon, so long as the order remains in force, no order made under Section 267, whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(z) Before making an order under sub-section (1), the State Government shall have regard to the following matters, namely:—

(a) the nature of the offence for which, or the grounds on which, the person or class of persons has been ordered to be confined or detained in prison;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison;

(c) the public interest generally

Section 269 creates a sort of an exception to Section 267. The section gives directions to the officer in charge of prison to abstain from carrying out the orders under Section 267 in certain contingencies. It has been held that this section does not confer any vested right on the prisoner for not being transferred.[92] The section reads as follows:

Officer in charge of prison to abstain from carrying out order in certain

269. Where the person in respect of whom an order is made under Section 267—

(a) is by reason of sickness or infirmity unfit to be removed from the prison; or

{b) is under committal for trial or under remand pending trial or pending a preliminary investigation; or

{c) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or *{d)* is a person to whom an order made by the State Government under Section *z6S* applies,

the officer in charge of the prison shall abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining: Provided that where the attendance of such person is required for giving evidence at a place not more than twenty-five kilometres distant from the [93]

prison, the officer in charge of the prison shall not so abstain for the reason mentioned in clause (b).

Section 270 directs the officer in charge of a prison to carry out the order passed by the court under Section 267 and prescribes the manner of executing such order. Section 270 is as given below:

Prisoners to be brought to Court in custody

270. Subject to the provisions of Section 269, the officer in charge of the prison shall, upon delivery of an order made under sub-section (r) of Section 267 and duly countersigned, where necessary, under sub-section {2) thereof, cause the person named in the order to be taken to the Court in which his attendance is required, so as to be present there at the time mentioned in the order, and shall cause him to be kept in custody in or near the Court until he has been examined or until the Court authorises him to be taken back to the prison in which he was confined or detained.

Section 271 empowers the court to issue commission for the examination of prisoner-witness. Section 271 is as follows:

Power to issue commission for examination

271. The provisions of this Chapter shall be without prejudice to the power of the Court to issue, under Section 284, a commission for the examination, as a witness, of any person confined or detained in a prison; and the provisions of Part B of Chapter XXIH shall apply in relation to the examination on commission of any such person in the prison as they apply in relation to the examination on commission of any other person.

Section 284 and the provisions of Part B of Chapter XXIII of the Code referred to above deal with the commissions for examination of witnesses. These have been discussed in Chapter 22, *infra.*

Summary procedure for trial for giving false evidence

16.15

It has been stated that perjury has of late greatly increased. The sanctity of the oath has almost disappeared and persons seem readily prepared to make false statements on oath in courts of law. The law, however, is very rarely invoked for the purpose of punishing the perjurer. It is perhaps felt that if punitive steps were to be taken against all persons who give false evidence the number of such prosecutions would be enormous. Nevertheless, steps have to be taken to control this growing evil which tends more and more to bring the administration of justice into disrepute.[93 94]

The procedures to be followed for prosecuting persons alleged to have committed offences of giving false evidence or fabricating false evidence have been already discussed in Chapter 10, *supra.*[93 94] It was, however, felt desirable to further strengthen the provisions by making some provision whereby perjury of a flagrant and unchallengeable type could be effectively punished *summarily* without prejudicing a fair trial of the person

93. *See,* 41st Report,
94. See, Ss, 195,

Summary procedure for trial for giving false evidence

concerned.[95] Section 344, which prescribes summary procedure for giving false evidence, is as given below:

344. (1) If, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may, after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under Section 340 for the offence, where it does not choose to proceed under this section.

(4) Where, after any action is initiated under sub-section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgment or order in which the opinion referred to in that sub-section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings of the trial shall abide by the results of the appeal or application for revision.

No doubt there are some risks involved in giving power to punish perjury to the very court before which it is committed. However, the provision contained in the section is of a very limited character, being confined to obvious cases of perjury and authorising a small punishment. Even this procedure is discretionary, so that where the court is of opinion that perjury, even though committed by contradictory statements on oath, is likely to raise complicated questions, or deserves more serious punishment than that permissible under the section, or is otherwise of such a nature that the ordinary procedure (contained in Sections 340-343) is more appropriate, the court might not proceed under this section.[96]

This section does not authorise the court to exercise the power at any time during the proceedings, because this might put witnesses in terror and may not conduce to the smooth progress of the inquiry or trial. The section allows the court to exercise the power only at the time of the delivery of judgment or final order, for it is only then that it will be in a position to assess the significance of the statements in the proper light.[97]

95. *See*, 41st Report, p. 299, para. 55.14.
96. *See*, 41st Report, p. 300, para. 35.14.
97. *See*, joint Committee Report, pp. xxiii-xxiv.

According to sub-section (4) above, further proceedings of any summary trial initiated under the section shall be stayed and any sentence imposed shall not be executed until the disposal of an appeal or revision against the judgment or order in the main proceedings in which the witness gave false evidence or fabricated false evidence. If this is not done the witness would have suffered the punishment even though ultimately as a result of the appeal or revision, the statements made by him would be found to have been justified.[1][2][3]

Before commencing the summary trial, it is necessary that the witness be given reasonable opportunity of showing cause why he should not be so punished.

The section is applicable in respect of a person who had *appeared* before the court as a witness. A person filing a false affidavit in a court cannot be considered as having appeared in court as a witness.[2][3]

It has been held by the Supreme Court that for exercising powers under Section 344, the court has to express an opinion at the time of passing the final order to the effect that the witness has either intentionally given false evidence or fabricated such evidence; the court must come to the conclusion that in the interest of justice the witness concerned should be punished summarily; and before the summary trial for punishment the witness must be given reasonable opportunity of showing cause why he should not be so punished. The court called for frequent use of this provision to contain the menace of perjury.[5]

The order of conviction and sentence passed under this section has been specifically made appealable under Section 351[4] in order to guard against arbitrary action by the court.

Powers of courts to deal with certain kinds of contempt

16.16

For preserving the dignity and decorum of every court, civil, criminal or revenue, Section 345 empowers each such court with special powers to deal summarily with cases of insult offered to the court in its presence. Section 345 reads as follows:

345. (1) When any such offence as is described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and may, at any time before the rising of the Court on the same day, take cognizance of the

Procedure in certain cases of contempt

1. *Ibid*, xxiv.
2. *Cbajoo*
3.

4. For the text of S. 351, *see infra*, para. 16.19.

offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(a) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(3) If the offence is under Section 22,8 of the Indian Penal Code (45 of i860), the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

The section is applicable in respect of five kinds of contempt:

1. Intentional omission to produce a document by a person legally bound to produce it. [S. 175 IPC]
2. Refusal to take oath when duly required to take one. [S. 178 IPC]
3. Refusal to answer questions by one who is legally bound to state the truth. [S. 179 IPC]
4. Refusal to sign a statement made to a public servant when legally required to do so. [S. 180 IPC]
5. Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding. [S. 228 IPC]

If any such offence is committed in the presence of the court, it may immediately cause the offender to be detained in custody, and may take cognizance of the offence on the same day before the rising of the court. The court shall give reasonable opportunity to the offender to show cause why he should not be punished. It is not necessary to take any evidence as the offence is committed in the presence of the court,[5] and also the court is not required to hear any evidence.[6] The court can sentence the offender to fine not exceeding [A]200, and in default of payment of fine to simple imprisonment for a term which may extend to one month.

A public servant discharging judicial functions may or may not constitute a civil, criminal or revenue court. It is only when he constitutes such a court that the action of summary trial can be taken under Section 345 in respect of offences mentioned therein. If the public servant is not such a court, he can proceed only according to the normal procedure for trial in respect of any such offence.[7]

Sub-sections (2) and (3) require that the record should be maintained properly. This would be helpful to protect the accused when dealt with

summarily by the court. Section 351[8] makes the order of the court appealable also.

The provisions of the section must be strictly followed; non-compliance with them or any of them would be fatal to the proceedings.[9]

If the court considers that an offence of the above five kinds should not be tried summarily or that it should require a heavier punishment, it may follow the procedure given in Section 346. Section 346 is as follows:

Procedure where Court considers that case should not he dealt with

346. (1) If the Court in any case considers that a person accused of any of the offences referred to in Section 345 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under Section 345, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such person before such Magistrate, or if sufficient *security* is *not* given shall forward such person in custody to such Magistrate.

(2) The Magistrate to whom any case is forwarded tinder this section shall proceed to deal with, as far as may be, as if it were instituted on a police report.

It has been provided by Section 347 that when the State Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act *(16* of 190S) shall be deemed to be a civil court within the meaning of Sections 345 and 34b,

Discharge of offender ***on*** *submission of apology*

348. When, any Court has under Section 345 adjudged an offender to punishment, or has under Section 346 forwarded him to a Magistrate for trial, for refusing or omitting to do anything which he was 1 awfully required to do or for any intentional insult or interruption, the Court may, in its discretion., discharge the offender or remit the punishment on his submission to the order or requisition of such Court or on apology being made to its satisfaction.

1617

Special summary procedure in respect of a witness refusing to answer questions or to produce documents

lamp r Comment or committal of person refusing to answer or produce document

This special procedure is provided by Section 349 which reads as follows:

349. If any witness or person, called to produce 2. document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires Him to produce, and does not, after a reasonable opportunity has been given to hi-n so to do, offer any reasonable excuse tor such refusal, such

8. For 'he text, of S. 551, *see infra,* para.

9.

exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal, he may be dealt with according to the provisions of Section 345 or Section 346.

16.18 Summary procedure for punishment for non-attendance by a witness in obedience to summons

Court proceedings are often delayed because of failure on the part of witnesses to attend the court in obedience to a summons. Section 350 provides for a summary procedure for the punishment of such witnesses. Section 350 reads as follows:

Summary procedure for punishment for non-attendance by a witness in obedience to summons

350. (1) If any witness being summoned to appear before a Criminal Court is legally bound to appear at a certain place and time in obedience to the summons and without just excuse neglects or refuses to attend at that place or time or departs from the place where he has to attend before the time at which it is lawful for him to depart, and the Court before which the witness is to appear is satisfied that it is expedient in the interests of justice that such a witness should be tried summarily, the Court may take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under this section, sentence him to fine not exceeding one hundred rupees.

(2) In every such case the Court shall follow, as nearly as may be

16.19 Appeals from convictions under Sections 344, 345, 349 and 350

Right of appeal is an important check on the improper exercise of the summary powers given to the courts under the above sections. This special right of appeal has been provided by Section 351 which reads as follows:

Appeals from convictions under Sections 344, 345, 349 and 350

351. (1) Any person sentenced by any Court other than a High Court under Section 344, Section 345, Section 349, or Section 350 may, notwithstanding anything contained in this Code appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXIX shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction hv a Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any Registrar or Sub-Registrar deemed to be a Civil Court by virtue of a direction

Chapter 17

Trial Procedures: Disposal of Criminal Cases without Full Trial

Scope of the chapter 17.1

Every reported crime does not necessarily lead to the initiation of criminal proceedings. As seen earlier the powers of the police to investigate are subject to certain restrictions in respect of some offences.[1] It has also been noticed that the powers of the Magistrates to take cognizance of offences and to initiate criminal proceedings are subjected to various constraints.[2] Even where the criminal proceedings are initiated, they may not necessarily lead to a full-fledged trial resulting in the judicial determination of the guilt or innocence of the accused. For diverse considerations, it may not be expedient or advisable to allow the criminal process to run its full course.

Under certain circumstances it may be advisable to allow the compounding of offences and to drop the criminal proceedings if there is a settlement between the accused person and the victim of the crime. Sometimes, the Public Prosecutor or the complainant may consider it expedient to withdraw from the prosecution; and the court may allow such withdrawal and put an end to the criminal proceedings. Under certain circumstances, the Magistrate himself may consider it desirable to stop the proceedings, and the Code, subject to certain safeguards, allows it to be done. The nonappearance or death of the complainant may necessitate the closure of the proceedings in some cases; and the death of the accused person himself may, subject to certain exceptions, result in the abatement of the case. For

j. *See supra*, Ss. 154-157, Chap. 8.
2. *See supra*, Ss. 190-99 ana Ss. 200-04, Chap. IO.

some overriding reasons it may be necessary to grant conditional pardon to the accused person in respect of his alleged involvement in the crime. In case such pardon is granted, it would become necessary to drop the proceedings against the accused person. The present chapter is designed to deal with these matters.

17.2 Compounding of offences

A crime is essentially a wrong against the society and the State. Therefore, any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognise some of them as compoundable offences and some others as compound- able only with the permission of the court. The compoundable offences are *mostly* non-cognizable, but all non-cognizable offences are not compoundable. Then again, the offences which are compoundable only with the permission of the court are *mostly* cognizable offences, though all cognizable offences are not so compoundable.[3 4] The general scheme for the compounding of offences has been given by Section 32,0 which reads as follows:

Compounding of ***offences*** Penal Code

320. (x) The offences punishable under the sections of the Indian (45 of i860}, specified in the first two columns of the 'Fable next following [3 4]

[4] [TABLE

Offence	Sou At of the Indian Cede applicable	PenA Person by whota offence may fee compounded
1	2	3
Uttering words, etc., with deliberate intent to wound the religious feelings of any	293	The person whose religious feelings are intended to be wounded
Voluntarily causing hurt	323	The person to whom the hurt is caused
Voluntarily causing hurt cn provocation	334	Ditto
Voluntarily causing grievous hurt on grave and sudden	335	Ditto

{contd.}

Offeree	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Wrongfully restraining or confining any person	341,342	The person restrained or confined
Wrongfully confining a person for three days or more	343	The person confined
Wrongfully confining a person for ten days or more	344	Ditto
Wrongfully confining a person in secret	346	Ditto
Assault or use of criminal force	352,355,358	The person assaulted orto whom criminal force is used
Theft	379	The owner of the property
Dishonest misappropriation of property	403	The owner of the property misappropriated
Criminal breach of trust by a carrier, wharfinger, etc.	407	The owner of the property in respect of which the breach of trust has been committed
Dishonestly receiving stolen property knowing it to be stolen	411	The owner of the property stolen
Assisting in the concealment or disposal of stolen property, knowing it to be stolen	414	Ditto
Cheating	417	The person cheated
Cheating by personation	419	Ditto
Fraudulent removal or concealment of property, etc., to prevent distribution among	421	The creditors who are affected thereby
Fraudulent preventing from being made available for his creditors a debt or demand due	422	Ditto
Fraudulent execution of deed of transfer containing false statement of consideration	423	The person affected thereby
Fraudulent removal or concealment of property	424	Ditto
Mischief, when the only loss or damage caused is loss or damage to a private person	426,427	The person to whom the loss or damage is caused
Mischief by killing or maiming	428	The owner of the animal
Mischief by killing or maiming cattle	429	The owner of the cattle or

{contd)

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Mischief by injury to works of irrigation by wrongfully diverting water when the only loss or damage caused is loss	430	The person to whom the loss or damage is caused
Criminal trespass	447	The person in possession of the property trespassed upon
House-trespass	448	Ditto
House-trespass to commit an offence (other than theft} punishable with	451	The person in possession of the house trespassed upon
Using a false trade or property mark	482	The person to whom loss or injury is caused by such use
Counterfeiting a trade or property mark used by	483	Ditto
Knowingly selling, or exposing or possessing for sale or for manufacturing purpose, goods marked with a	486	Ditto
Criminal breaoh of c ontract of service	491	The person with whom the offender has contracted
Adultery	497	The husband of the woman
Enticing or taking away or detaining with criminal intent	498	The husband of the woman and the woman
Defamation, excnpt such cases as are specified against Section 500 of the Indian Penal Code (45 of 1860} in Column 1 of the Table under	500	The person defamed
Printing or engraving matter, knowing it to be defamatory	501	Ditto
Sale of printed or engraved substance containing defamatory matter, knowing	502	Ditto
insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation	506	The person intimidated
Inducing person to believe himself an object of divine	508	The person induced]

{2} The offences punishable under the sections of the Indian Penal Code (45 of i860), specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:— [5]

'[TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be
1	2	3
Causing miscarriage	312	The woman to whom miscarriage is caused
Voluntarily causing grievous hurt	323	The person to whom hurt is caused
Causing hurt by doing an act so rashly and negligently as to endanger human life or the	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the	338	Ditto
Wrongfully confining a person forthree days or more.	343	The person confined.
Assault or criminal force in attempting wrongfully to confine a	357	The person assaulted or to whom the force was
Theft, by clerk or servant of property in possession of master	381	The owner of the property stolen
Criminal breach of trust	406	The owner of property in respect of which breach of trust has been
Criminal breach of trust by a clerk or servant	408	The owner of the property in respect of which the breach of trust
Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect	418	The person cheated
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a	420	The person cheated
Marrying again during the life-time of a husband or wife	494	Thehusband or wife of the person so marrying

5. *Subs,* by Act 5 of 2009 (w.e.f. 3-1-12-2009).

(contd.)

Offence	Section of the Indian Penal Code applicable	Person *by* whom offence may be compounded
1	2	3
Defamation against the President or the Vice-President or the Governor of a State or the Administrator of a Union territory or a Minister in respect of his public functions when instituted	**500**	**The person defamed**
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding	**509**	**The woman whom it was intended to insult or whose privacy was intruded upon]**

[6]f3} When an offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) or where the accused is liable under Sections 34 or 149 of the Indian Penal Code {45 of i860) may be compounded in like manner.]

(4) *{a)* When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.

{b} When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 {5 of 1908), of such person may, with the consent of the Court, compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision under Section 401 may allow any person to compound any offence which such person is competent to compound under this section.

{7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8} The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this section.

The last sub-section (9) makes it quite clear that offences not provided by this section are not compoundable. According to the scheme of the section, all offences under the special or local laws are simply non.componndable* [6]

6. *Subs,* by Acr 5 of 2009 (w.e.f. 31-12.-20c

speaking, offences other than those specified in sub-sections (i) and (2) cannot be compounded."

However, the Supreme Court in *Mabesh Chand* v. *State of Rajasthan** gave permission to compound the offence under Section 307, Penal Code, i860 (IPC) (attempt to commit murder). Following this the High Courts in India have been rendering conflicting judgments.[7 9 10] While some High Courts follow the Supreme Court invoking[50] their inherent powers under Section 4S2, others[15] refuse to follow on the ground that they do not have the plenary power conferred on the Supreme Court in Article 142 of the Constitution under which apparently the Supreme Court permitted compounding of offence under Section 307 IPC.

An interesting fact relevant here is the attitude of the High Courts in permitting compounding of offence under Section 498-A IPC (cruelty to wives), in the interest of peace in the family and in public Interest some courts permitted compounding of such offences, while others refused[12] to follow suit on the ground that they do not have powers.[13] The Rajasthan High Court which falls in the latter category noted that in such cases it is for the Public Prosecutor to withdraw the case rather than to request the High Court to permit compounding. Its observations are pertinent.

In such cases it is the duty of the Public Prosecutor to consider and decide whether to withdraw from the prosecution or not. It is not the duty or the concern of the court to consider the welfare of the parties

7. *Sholapur Municipal Corpn.* v. *Ramkrishna,* 1970 Cri LJ 5:330, 1332: AIR 1970 Bom 333; *Trikamdas Udeshi* v. *Bombay Municipal Corpn.,* AIR 1954 Born 427, 428: *Bismabahan Das* v, *Gopen Chandra Hazarika,* 1:967 Cri Lj 828: AIR 1967 SC 895, 897; *Sk. Saifuddain Mandat* v. *State,* 1983 Cri Lj 109, nr (Cai). However, in ease of offences not seriously affecting public at

9. *R.amesb* v. *State of M.P.,* 2006 Cri Lj 3855 (MPj; *Balvecr Prasad-* v. *State of* U.P., 2007 Cri Lj r.96 (All).

10. *Thathapadi Venkatalaqshini* v. *State of Add.,* 5991 Cri IJ 749 (AP); *Daggupati jayaiakskmi* v. *State.*

'll. *Desho* v. *Stale,* 1992 Cri Lj 74 (Cai); *Goiak Chandra Nayak* v. *State of Orissa,* 1993 Cri Lj 274

12. *Aieya Verma* v. *State of Bihars* 2006 Cri LJ 3520 i Pat).

13. *Gursbaran Kaur* v. *State of Rajasthan,* 1993 Cri Lj 2076 (Rai); *Ravinder Krisban* v. *DT Admn., Chandigarh,* 1997 Cri Lj 9 (P&H). *Rajasthan,* 1997 Cri Lj *2178* (Raj) dismissing prayer for quashing

in their favour for allowing them to do something which the law does not permit.[11]

The Supreme Court has in *Ram Lai* v, *State ofJ&K*[14][15][16] overruled its decision in *Mahesh Cband*[16] and explained its position thus:

> It is apparent that when the decision in *Mahesh Chand* v. *State of Rajasthan,* [1990 Supp SCC 681: 1991 SCC (Cri) 159] was rendered, the attention of the learned judges was not drawn to the aforesaid legal prohibition. [S. 32.0(d)] Nor was the attention of the learned Judges who rendered the decision in *Y. Suresh Babu* v. *State of* A.P., [(2005) 1 SCC 347: 2005 SCC (Cri) 320: JT (1987) 2 SC 361] drawn. Hence those were decisions rendered *per incuriam.* We hold that an offence which law declares to be non-compoundable even with the permission of the court can not be compounded at all.[14][15][16][17]

The anxiety to help accused avoid trial has made some High Courts either to alter the conviction, in appeal, under a compoundable offence[18][19][20][21][22][23][24] or to suspend the sentence for two years and then to compromise.[19][20]

The conundrum resulting from conflicting opinions has ultimately led to the decision in *B.$. Joshi* v. *State of Haryana*[10] by the Supreme Court which ruled that in a situation of proceedings on the basis of non-compoundable offences like Sections 498-A and 406, the High Court could quash them under Section 482 CrPC. Though the Kerala and Delhi High Courts followed this decision[21][22][23][24], a two-member Bench of the Supreme Court i *n Bankat* v. *State of Maharashtra*[11] *(Bankat)* ruled that a non-compoundable offence could not be compounded. This was followed by the Karnataka High Court in *Nazimunnisa* v. *State of Karnataka*[13], wherein the judge did not permit prosecution under Section 498-A to be quashed under Section 482 CrPC. But the Madras High Court in *Sampath* v. *State*[24] permitted proceedings under Section 498-A to be quashed under Section 482 CrPC. Still the Supreme Court stuck to its decision in *Bankat* in 2006.[25]

The conflicting decisions of two-member Bench on the question of quashing the proceedings under Section 482 after compromise between the parties despite the offences like the one under Section 498-A IPC being non-compoundable, came to be settled in *Gian Singh* v. *State of*

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Punjab[26] upholding *B.S, Josbiv. State of Haryana*[27]. So offencesarising out of matrimony relating to dowry, etc. or family disputes where the wrong is basically private or personal in nature and parties have resolved their disputes, High Court may quash proceedings under Section 482 of the Code. This power is different from the power of criminal court to compound offences.

Sub-section (x) lists 21 Penal Code offences which may be compounded by the specified aggrieved party without the permission of the court, and sub-section (2) lists 36 other Penal Code offences which also may be compounded but only after obtaining the permission of the court. The use of the word "pending" in sub-section (2) indicates that an application for compounding the offence must be made in a pending proceeding. Once the appeal has been finally disposed of, there is nothing pending and, therefore, an application under Section 320 cannot be entertained.[28]

An offence specified in columns 1 and 2 of the table can be compounded only by the person specified in column 3 of the table,[29] and it is immaterial whether such a person was a complainant or not, or whether the case was instituted on a police report or on a private complaint. According to sub-section *(4)(a),* if the person so specified is a minor or an idiot or a lunatic, any person competent to contract on his behalf can compound such offence with the permission of the court. It may be noted that the permission of the court is necessary even in cases of offences covered by sub-section {1}. If the specified person referred to in column 3 is dead, subsection *{4){b)* provides that the legal representative of the deceased may compound the offence after obtaining the permission of the court.

A case may be compounded at any time before the sentence is pronounced.[30] If after conviction there is an appeal, the offence can be compounded with the permission of the appellate court.[31] Under sub-section *(6)* the High Court and Court of Session have been empowered to allow' the compounding to be recorded in revision after the conviction by the trial court. However, this power should be used sparingly and only in cases where the aggrieved party is actually before the court and has given his/ her consent to such compounding.[32]

26. (2012) TO SCO 303: {2013) 1 SCC (Cri} 160: 2012 Cri Lj
27. (2003) 4 SCC 675: 2003 SCC (Cri) S4S: 2003 Cri Lj 2028.
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29. *Daft ha Ramji Patil* v. *Emperor,* (1927) 28 Cri Lj 581: ILR
30.
31. *Bhim Singh* v. *State* o/U.P., (1974) 4 SCC 97: 1974 SCC (C
32. *Gurunarayan Das v. King Emperor,* {1947) 48 Cri Lj 43

A composition arrived at between the parties to a compoundable offence is complete as soon as it is made, and it has the effect of acquittal of the accused under Section 320 in respect of that offence, even if one of the parties subsequently resiles from the compromise or even in cases where no statement or petition recording the compromise is hied in the court by the parties.[33] It is not always necessary that the compromise petition must necessarily be hied by the complainant. It can even be hied by the accused.[34] It may, however, be noted that when the accused alleges that an offence is compounded, the burden is on him to prove that there was a valid compounding of the offence. ;

When an acquittal is based on the compounding of an offence and the compounding is invalid under the law, the acquittal would be liable to be set aside by the High Court in exercise of its revisional jurisdiction.[35]

While granting permission to compound an offence the court should act judicially and should exercise a sound and reasonable discretion.[36] The safeguard of the court's permission is to prevent an abuse of the right to compound and to enable the court to take into account the special circumstances of the case which may justify composition.[37] While granting permission to enter into the composition and accepting the same, the chastened attitude of the accused and the commendable attitude of the injured complainant, in order to restore harmony in society, were taken into consideration by the court.[38]

The section is not applicable in respect of a compromise in case of a norr-compoundahle offence; however, the fact of such compromise can be taken into account in determining the quantum of sentence.[39]

1Z3 Withdrawal from prosecution

ia) Object and purpose.—Once a prosecution is launched, its relentless course cannot be halted except on sound considerations germane to public justice.[40] Section 321 implicitly makes room for such considerations by enabling the Public Prosecutor to withdraw from, the prosecution of any

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34. *State of*

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37. *See,*

38. *Ramji*

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person with the consent of the court. The withdrawal from prosecution under the section may be justified on broader considerations of public peace, larger considerations of public justice and even deeper considerations of promotion of long-lasting security in a locality, of order in a disorderly situation or harmony in a faction milieu, or for halting a false and vexatious prosecution.[41] Section 3x1 reads as follows:

32.1. The Public Prosecutor or Assistant Public Prosecutor in charge of a *wihdmml* case *prosecution*

may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in

respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b} if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence—

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(it) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946}, or *(Hi)* involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or *(iv)* was committed by a person in the service of the Centra! Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent, to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.

The section provides for "the withdrawal from the prosecution" and not "the withdrawal of the prosecution". Withdrawal from a prosecution means retiring or stepping back or retracting from the prosecution, in other words, withdrawal of appearance from the prosecution or refraining from conducting or proceeding with the prosecution. However, when the court consents to such withdrawal from the prosecution, the accused person shall be discharged or acquitted in accordance with the provisions of clauses *(a)* and *(b)* of Section 3 21.[42]

(b) \Alithdrawia 1 *w/ho^n* The Public Prosecutor or the Assistant Public

41. *Ibid.*

42. *Public Prosecutor* v. *Mandangt Varjuno,* 1976

under Section 321 seeking permission to withdraw from the prosecution.[43] The original complainant has no say in making the decision either to withdraw or not to withdraw from the prosecution.[44] However, if the prosecution is being conducted by the complainant on a private complaint, the Public Prosecutor is not entitled to apply for withdrawal of the prosecution in such a case.[45]

(c) *Withdrawal from prosecution of whom and in respect of which offence.*—According to the provisions relating to joinder of charges and of accused persons, it is possible that an accused person might have been charged with more than one offence and that more than one accused person might have been prosecuted at the same trial.[46] [47] [48] [49] [50] [51] Therefore, Section 321, in its wide amplitude, provides that the Public Prosecutor may withdraw from the prosecution of *any person* either generally or in respect of *any one or more of the offences* for which he is charged.

(d) Up to what stage of trial withdrawal is possible.—Withdrawal from the prosecution can be sought "at any time before the judgment is pronounced" by the trial court.[47] [48] Therefore, the Public Prosecutor has no right at the appellate stage of a case to present any petition for withdrawal under Section 321.[45] On the other hand, an application for withdrawal from prosecution can be moved even during the pendency of the committal proceedings in the Court of a Magistrate in a case in which the offence is exclusively triable by a Court of Session, and the Magistrate is competent to give consent to such withdrawal.[49] [50] [51]

According to Section 354,[50] the judgment must specify the offence of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced, and the judgment, according to Section 353[1] is pronounced by delivering or reading out the whole of it or by reading out its operative part. Therefore, the pronouncement of

43. *State of*

44. *Sara*

45. *Ibid.*

46. *See*

47. *T.C.*

48. *Pu bli*

49. *R aj en de r Ku*

50. S. 354 refers to language and contents of judgment. *See infra,*

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judgment must cover both conviction and sentence. Now in cases where the accused is convicted and the court is required under Section 235(z)[52 53] or Section 248(2)>[5] to hear the convicted accused on the question of sentence (before the sentence is passed), can an application for withdrawal from the prosecution be entertained in such a case after the conviction but before the sentence is passed? This question has not as yet come before the courts for decision. Probably, the courts may be inclined to take the view that once the order of conviction is passed, the right to move the court for withdrawal from the prosecution ceases to exist.

{e} Conditions precedent for withdrawal.—The Public Prosecutor can withdraw from the prosecution only with the consent of the court. Further, if the Public Prosecutor in charge of the case *has not been appointed by the Central Government and* the offence, in respect of which the withdrawal from prosecution is sought, falls within any of the four categories mentioned in the proviso to the above Section 321, then, in such a case, the prosecutor cannot move the court for obtaining its consent unless he has been permitted by the Central Government to do so. In such a case the court is also required to direct the prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution. The above provision requiring the permission of the Central Government has been enacted with a view to avoid any possible conflict of interest between the State Government and the Central Government.[52 53 54]

(f) Discretion of Public Prosecutor and of court in the matter of tuith- drawaL—The section does not indicate the reasons which should weigh with the Public Prosecutor to move the court for permission nor the grounds on which the court will grant or refuse permission.[55] However, the functional dichotomy of the Public Prosecutor and the court has been dearly indicated by the Supreme Court in several decisions. It has been observed:

> [I]t shall be the duty of the Public Prosecutor to inform the court and it shall be the duty of the court to apprise itself of the reasons which prompt the Public Prosecutor to withdraw* from the prosecution. The court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the executive by resort to the provisions of Section 321 of the Criminal Procedure Code.

52. For S. 2.35(2), *see infra*, para. 19.7.
53. For S. 248(2), *see infra*, para. 20.11.
54. *See*, 41st Report, Vol. I, p. 313, para. 38.6.
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> The independence of the judiciary requires that once the case has travelled to the court, the court and its officers alone must have control over the case and decide what is to be done in each case.[56]

(g) The position of the Public Prosecutor as regards the withdrawal from the prosecution.—Under the scheme of the Code the prosecution of an offender for a serious offence is primarily the responsibility of the executive, and the withdrawal from the prosecution is an executive function of the Public Prosecutor.[57] The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender it to someone else. The government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so. The Public Prosecutor is an officer of the court and responsible to the court.[58] [59]

While apparently accepting the above position, a somewhat inconsistent view—inconsistent at least in its spirit—has been expressed by Baharul Islam j (as he then was) in *Sheonandan Paswan* v. *State of Bihar*[59]. He observed:

> Unlike the judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government, Central or State *{see,* Sections 24 and 25, CrPC), appointed for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. ... Section 321 ... does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. ... On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government.[60]

The judge even went to the extent of suggesting that in case the Public Prosecutor is unable to agree with the view taken by the government in respect of the withdrawal from the prosecution, "the Public Prosecutor will have to return the brief and perhaps to resign". With respect, it is submitted that the above view expressed by Baharul Islam j blurs the vision while considering the scope and nature of the statutory discretion given

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57. *Ibid.* It is

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to the Public Prosecutor in Section 321 in respect of withdrawal from prosecution.

This decision has since been reviewed by the Supreme Court.[61 62] It has been categorically laid down that a Public Prosecutor can withdraw the case at any stage of the prosecution and that the only limitation is the requirement of consent of the court.[61 62 63] According to the court even where reliable evidence has been adduced to prove the charges, the Public Prosecutor can seek the consent of the court to withdraw from prosecution.[63]

In *Sbeonandan Paswan* v. *State of Bihar*[64 65] the majority held that Public Prosecutor wields discretion to withdraw prosecution, and the only limitation on this power is the requirement of court's consent. According to Khalid J, all that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. Venkataramiah J, one of the judges constituting majority, has stated that he would not interpret Section 321 in the light of the principles of administrative law.

The Supreme Court has reiterated its view[7 65]$ thus:

> There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interests of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in the Code of Criminal Procedure, undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it.[8]>

As has been expressed in other decisions, the statutory responsibility for deciding withdrawal squarely rests upon the Public Prosecutor. It is nonnegotiable and cannot be bartered away in favour of those who may be above him on the administrative side.[66]

61. *Sheonandan Paswan* v. *State of Bihar*, (1987) *1*
62. Even if government directs Public
63. *Mohd. Mumtaz* v. *Nandini*
64. *Sheonajidan Paswan* v.
65. *Shrilekha Vidyarthi* v. *State of U.P.*, (1991) 1 SCC 212, 233: 1991 SCC
66. *Balwant Singh* v. *State of Bihar*, (1977) 4 SCC 448: 1977 SCC (Cri) 633, 635: 1977 Cri LI *935; see also, *M.N, Sankarayarayanan Hair* v. P.V. *Balakrishnan*, (1972) 1 SCC 318: 1972 SCC (Cri) 55, 61: 1972- Cri LJ 301; *Nai/mtdas*

(h) Discretion of Public Prosecutor, how to be exercised.—The Public Prosecutor has a statutory function entrusted to him by Section 321 with a power to withdraw from a prosecution.[67] However, the statutory discretion vested in him is neither absolute nor unreviewable but it is subject to the court's supervisory functions. In fact, being an executive function, it would be subject to a judicial review on certain limited grounds like any other executive action.[68]

The section is in general terms and does not circumscribe the power of the Public Prosecutor to seek permission to withdraw from the prosecution. However, the essential consideration which is implicit in the grant of the power is that it should be in the interest of the administration of justice which may be either that he will not be able to produce sufficient evidence to sustain the charge or that subsequent information before the prosecuting agency would falsify the prosecution evidence or any other similar circumstance which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case.[69] The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and political purposes sans Tammany[70] Hall enterprises.

The Supreme Court has observed:[71]

> In the past, we have often known how expedient and necessary it is in the public interest for the public prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial

67. *State of Punjab* v.

68. *Sheo*

69. *M.N. Sankarayarayan an Nair* v. *P.V.*

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71. *Rajender Ku*

conflicts, student unrest etc. Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter-productive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecution already launched. In such matters who but the Government can and should decide, in the first instance, whether it should be baneful or beneficial to launch or continue prosecutions.[72]

If the government decides that it would be in the public interest to withdraw from prosecution, they should advise the Public Prosecutor to withdraw from the prosecution. As a rule, though it is for the Public Prosecutor to initiate the proceeding for withdrawal from the prosecution, he should seek guidance from the policy-makers where such large and sensitive issues of public policy are involved. Because in such matters his sources of information and resources are of a very limited nature unlike those of the policy-makers.[73]

When the prosecutor does not take an independent decision but blindly follows the government's instructions, the result would he disastrous not only for the accused but also for the administration of justice. In *Ganesan* v. *State ofT.N*,[74], the court came across with a case where after first withdrawing the case with court's consent the prosecutor again tried to launch prosecution on the same charge. The Madras High Court disapproved this practice.

In *Abdul Karim* v. *State of Karnataka*[7]*, the Supreme Court reiterated the law in *Sheonandan Baswan* v. *State of Bihar*[76] that though the government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently, that the Public Prosecutor, [72-73-74-75-76]

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73. *Ibid*, 768 [SCC {Cri}].
74. *State* v. *L. Ganesan*, 1995 Cri Lj 3849 (Mad).
75. {2000) 8 SCC 710.
76. {1983} *1* SCC 438: 1983 SCC (Cri) 224.

from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.

For the purposes of Section 32,1 there is no dichotomy as such between political offences or the like on the one hand and common-law crimes on the other. The decisions of the Supreme Court have, however, laid down that when common-law crimes are motivated by political ambitions or considerations, or they are committed during or are followed by mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or like situations involving emotive issues giving rise to an atmosphere surcharged with violence, the broader cause of public justice, public order and peace may outweigh the public interest of administering criminal justice in a particular litigation and withdrawal from the prosecution of that litigation would become necessary, a certainty of conviction notwithstanding, and persistence in the prosecution in the name of vindicating the law may prove counter-productive. In other words, in case of such conflict between the two types of public interests, the narrower public interest should yield to the broader public interest.[77] The term "public interest'" is vague. It is almost difficult to define, though in a set of circumstances it may be easy to comprehend.[78 79]

In *State of U.P.* v. *AddL District & Sessions Judge*[79], the Allahabad High Court upheld the order of the trial court rejecting request for consent for withdrawal from prosecuting a former woman dacoit on various serious charges as she belonged to a lower caste and she committed the various crimes to take revenge upon her enemies who tortured her, on the ground that in future such a step may give rise to caste wars in the State.

ii) Discretion of court in according consent how exercised.—While granting permission for withdrawal from prosecution, the court should not do so as a necessary formality—granting it for the mere asking. It may accord consent only if it is satisfied on the materials placed before it that the grant of permission would subserve the administration of justice and that the permission is not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty-bound to further and maintain.[80]

The section gives a wide discretion to the court either to grant or withhold consent. But like all judicial discretions it must not be exercised arbitrarily or fancifully but only on sound legal principles.[81] No hard and fast rule can be laid down, nor can any categories of cases be defined in which

77. *Sheonandan Pa.su/an* v. *State of Bihar,* (1983) 1 SCC 438: 1983 SCC
78. *Pur shod am Vi jay* v. *State,* 1982 Cri Lj
79. 1997 Cri Lj 3021 {All}.
80. *M.N. Sank araya ray an an Nair* v. *P.V. Baiakrishnan,* {1972) 1 SCC 318: 1972 SCC (C'rij 55, 61: *972 Cri Lj 301;
81. *'Purshottam Vijay* v. *State,* 1982 Cri Lj

consent should be granted or refused. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote justice.[82] On request for consent by the prosecutor the court should apply its mind and decide judicially whether to give consent or not.[83] The order of the court must be a speaking order which means the order must be based on sufficient reasoning so that the superior court can look into the propriety or legality of the order. Consent must emerge from an opinion formed by the court on the grounds and circumstances that may be connected with the case. A judicial opinion must be based on some objective materials placed before the court simultaneously with the prayer for withdrawal.[84,85,86] Where there are specific provisions laying down the procedure to be followed when the Magistrate finds that an accused cannot be served with summons, there is no justification for not following those provisions and granting permission to Assistant Public Prosecutor to withdraw the case without prejudice to the right to file fresh complaint when the accused becomes available.[85,86]

The court performs a supervisory function in granting its consent to the withdrawal. Here the court's duty is not to re~appreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution, but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the .. 86. prosecution.

There have been instances where the court refused consent as withdrawal might have affected public confidence in the criminal justice system.[87] In *Abdul Karim* v. *State of Karnataka***, when the State Government wanted to withdraw prosecution against some notorious criminals the Supreme Court deprecated the decision of the State Government and

82. *State of Orissa* v. *Chandrika Mobapatra*, (1976) 4 SCC 2.50:1976 SCC (Cri) 584. 588:

S3. V. *Krishnasamy* v. *S.K. Monobaran*, 1997 Cri Lj 654 (Mad).

84. *Pijusb* v. *Ramesh*, 1982 Cri LJ 452, 456 (Gau).

85. *State* v. *Mobd. Ismail*, 1981 CriLJ 1553, 1555 (Ker).

86. *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435, 445: 1980 SCC (Cri) 757, 767: 1980 Cri LJ

87. See, *Chhaya Laxman Sapkale* v. *State of Maharashtra*, 1991 Cri Lj 398 (Bom). •38. (2000) 8 SCC 7x0:

upheld the right of the general public to prevent withdrawal of prosecution being permitted by the court with the support of the State Government.

If the view of the Public Prosecutor is one which could in the circumstances be taken by any reasonable man, the court cannot substitute its own opinion for that of the Public Prosecutor. If the Public Prosecutor has applied his mind on the relevant materials and his opinion is not perverse, and which a reasonable man could have arrived at, a roving inquiry into the evidence and materials on the record for the purpose of finding out whether his conclusions were right or wrong would be incompetent. That would virtually convert the court into an appellate court sitting on judgment.[89]

(/) *Consequetices of withdrawal from prosecution.*—These have been mentioned in the section itself: *i)* If the withdrawal from the prosecution is made before the charge has been framed, the accused shall be discharged in respect of the concerned offence or offences; and *u)* if the withdrawal is made after a charge has been framed, or when under the Code no charge is required, the accused shall be acquitted in respect of the concerned offence or offences.

(k) Remedy against the order passed under Section 321.—As mentioned earlier, there is no appeal provided against the order passed under Section 321. Therefore, the only remedy is to invoke the revisional jurisdiction of the Court of Session or of the High Court under Section 397.[90] The order under Section 321 is not an interlocutory order and, therefore, a revision petition can be filed against such order.[91]

(/) *"Locus standi" of a complainant or any other person opposing withdrawal.*—Section 321 does not mention whether a complainant or any other person can oppose the application of the Public Prosecutor seeking permission to withdraw from the prosecution. In *Sheonandan Paswan* v. *State of Bihar*[92], it appears that the petitioner-appellant had applied before the trial court under Section 302[93] for permission to conduct the prosecution when the Public Prosecutor sought permission to withdraw from the prosecution. His application was rejected and the Public Prosecutor was allowed to withdraw from the prosecution. Against this decision, the petitioner hied a revision petition before the High Court of Patna but the same was dismissed. Similarly, in *Subhash Chander* v. *State (Chandigarh Admn.)*[94], the private complainant did oppose, though unsuccessfully, the

S9. *Sheonandan Paswan* v. *State of Bihar*, (1983} 1 SCC 438: 1983 SCC (Cri) 22.4, 307-08: 1983 Cri LJ 548 *(per* Misra J).

90. For the text of S. 397, *see infra*, para. 2.5,3,

91. *Public Prosecutor* v. *Paga Pulla Reddy*, 1977 Cri LJ 2013 (AP).

92. {1983) 1 SCC 438: 1983 SCC (Cri) 224: 1983 Cri LJ 348.

93. S. 302 deals with permission to conduct prosecution. For the text of S. 502, *see supra*, para. 14.6.

94. (1980) 2 SCC 155: 1980 SCC (Cri) 376: 1980 Cri LJ 324,

application for withdrawal. However, the question of *locus standi* of a private complainant or of any other person in the matter of proceedings under Section 3ZI has not been decided so far.[1 2] The Andhra Pradesh High Court in M. *Balakrisbna Reddy* v. *Home Deptttd* has held that a third party who has suffered as a result of the offence shall have the right to prosecute if the State withdraws the prosecution.

There is no appeal provided against the order passed under Section 321 and the only remedy is to invoke the revisional jurisdiction of the Court of Session or of High Court under Section 397. The revisional court can take action either suo motu or on the application of any person.[1 2 3] Such a person cannot be the Public Prosecutor or the accused person if the order under Section 321 is one of allowing the withdrawal from the prosecution. The question whether a private complainant or any other person has *locus* in such matters has not been finally decided so far. In some cases[4] decided by the Supreme Court, the order permitting withdrawal was challenged by a complainant or a private citizen. In these cases the challenge was entertained, heard and decided on its merits dehors the *locus standi* of the person raising it. The High Courts of Kerala[5], Nagpur[6], and Bombay[7] were inclined to accept the *locus standi* of a private person or complainant in these matters, while the High Courts of Patna[8], Calcutta[9], and Delhi[10] have expressed a view to the contrary.

When the Public Prosecutor decides to withdraw from the prosecution, the interests of the accused and of the prosecution virtually merge with each other and the adversary system of trial so essential for reaching the truth and attaining justice ceases to operate. Therefore, it would be desirable to allow the private complainant to oppose the proceedings for withdrawal at the trial stage and if necessary at the revisional stage also. Further, irrespective of a private complainant's *locus standi,* the community at large is also concerned in matters relating to the administration of criminal justice. Therefore, a private citizen intending to

1. But see, *Saramma Peter* v. *State of Kerala?* 1991 Cri LJ 32.11 {Ker}.
2. 1999 Cri LJ 3566 (AP).
3. *See,* S. 397(3); for the text of S. 397, *see infra,* para. 2.5.3.
4. *State of Bihar* v. *Ram Naresk Pandey.* 1957 Cri Lj 567: AIR 1957 SC 289;
5. *Accou ntant-General* v.
6. *Satwarao Nagorao Hatkar* v. *Kanbarao Bhago Rao Hatkar,* AIR
7. *Naimitd*
8. *Guili Bhagat* v. *Nam in Singh,* AIR 1924 Pat 283.
9. *Abdur Karim* v. *State,* 1981 Cri IJ 219, 223 (Cal).
10. *Rajender Kumar Jain* v. *State?* (1980) 3 SCC 435: 1980 SCC (Cri) 757, 762: 1980 Cri LJ 1084 (observation regarding the decision

oppose proceedings under Section 321 in the interests of justice, may, in the discretion of the court, be allowed to do so. The decision in V.S. *Achuthanandan* v. R. *Balakrisbna Pillai*[n] approving the *locus standi* of the opposition leader for opposing the proposal for withdrawal from prosecution of a Minister, on the ground that none has opposed his *locus standi,* seems to be a trend-setter in this direction. It may still further be suggested that even if there is no challenge from a private person to the withdrawal proceedings under Section 321, the court should seek the assistance from the Bar by appointing an advocate as amicus curiae to represent the interests of society at large.

17A Withdrawal of complaint

On the examination of the various provisions of the Code, it does not appear that there is any provision for the withdrawal of a complaint in a warrant case or a sessions case.[11 12] The only relevant provision in this respect is contained in Section 224. That section provides that when a charge containing more heads than one is framed against the same person and when a conviction has been had on one or more of them, the complainant or the officer conducting the prosecution may, with the consent of the court, withdraw the remaining charge or charges. Section 224 has been already discussed in Chapter 15 dealing with charge.[11 12 13]

In a summons case, however, Section 257 enables the complainant to withdraw the complaint with the permission of the court. Section 257 is as given below:

Withdrawal of complaint

> 257. If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn.

If the person seeking withdrawal of the complaint is not the complainant, the section would not apply. Where the criminal case was initiated on a police report and not on a complaint, the Magistrate cannot acquit the accused on the application of withdrawal made by a person at whose instance the police moved in the case.[14 15]

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13. *See*
14. *State*
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The section does not indicate what grounds will be considered as sufficient grounds. That will depend upon the facts and circumstances of each case.

If the Magistrate permits the withdrawal of the complaint, it is imperative that he shall acquit the accused the complaint against whom is so withdrawn.

Power o£ court to stop proceedings in certain 5 cases 17.

In a summons case instituted otherwise than upon a complaint, the court has been given power to stop the proceedings at *any stage* without pronouncing any judgment. This has been provided by Section 258 which reads as follows:

258. In any summons-case instituted otherwise than upon complaint, a

Power to stop proceedings in certain cases

Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

The stoppage of proceedings will have the effect of acquittal of the accused if the stoppage is made after the evidence of principal witnesses has been recorded; and if the stoppage is made before such evidence has been recorded it shall have the effect of discharge of the accused person.

Though the section does not prescribe the limits within which the Magistrate should act, the Magistrate exercising the power conferred on him by the section should see whether there are special and unusual circumstances to act thereunder; it is not a routine order which the Magistrate can pass under that section.[16] If it is found that the case can be decided on merits without any hindrance, in the normal manner as per procedure contemplated by the Code, there is no reason to take resort to

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17. *State of Gujarat* v. *Lobana Dbirajlal,* 1973 Cri Lj 82

reasonable ground for believing that such an offence has been committed and once the machinery of the law has been set in motion, the right of arresting progress rests with the State alone.[18] It is, therefore, understandable that in case of a trial before Court of Session, no provision has been made in respect of non-appearance or absence of the complainant at the time of trial. In a case where the proceedings are initiated on a complaint and the complainant remains absent and fails to prosecute the case, the court has power under Section 302[19] to substitute another prosecuting agency subject to such restrictions as are mentioned therein.[20]

In case of a trial of a warrant case, if the proceedings were initiated on a complaint and if the offence is compoundable or non-cognizable, the Code does not consider the prosecution of the case as absolutely essential to safeguard social interests. Therefore, If the complainant is absent and if the charge Is not as yet framed, then the court has got the discretion to discharge the accused. This has been provided by Section 249 which runs as follows:

> 249. When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or Is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

The section applies not only to cases where the offence is a compoundable one but also where though it is not compoundable, it is non-cognizable. The power under the section can be exercised in respect of all compound- able offences, whether cognizable or not, and all non-cognizable offences, whether compoundable or not.[21]

The order of discharge passed under this section is not one passed on the consideration of the merits of the case, and so it is open to the complainant to file a fresh complaint.[22] However, as the order of discharge is a final order, Section 362[23] would not permit the Magistrate to review his own order of discharge, and the remedy of the complainant is to go in revision against such an order.[24]

Absence of complainant

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After the framing of a charge, the Magistrate has no power under this section to acquit or discharge the accused.[25][26][27][28]

The words "is absent" indicate some sort of wilful act on the part of the complainant or at least, a culpable negligence in keeping himself away from the court.[26]

The Supreme Court has held that the complainant's absence does not necessarily bind the court with a duty to acquit the accused "in invitum". If the court feels that on a particular day the complainant's presence is not necessary and that the proceedings can be adjourned the court can do so.[27][28]

The discretion given to the Magistrate to discharge the accused under Section 249 is to be exercised judiciously and not arbitrarily. The Magistrate is not to make the order of discharge automatically. He has to examine the facts of the case before he proceeds to discharge the accused.[25]

Where the non-appearance or absence of the complainant is due to his death, the proceedings do not abate and the provisions of this section giving discretion to the Magistrate may, it is submitted, apply to such a case also.[29]

(b) Summons cases.—If a summons case is instituted on a private complaint greater responsibility is thrown on the complainant to prosecute the case. In the event of non-appearance of the complainant the court has wide discretion to deal with the case. It may acquit the accused, or adjourn the hearing of the case to some other day, or it may dispense with the attendance of the complainant and proceed with the case. This has been provided by Section 256 which reads as follows:

256. (1} If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

Non-appearance or death of complainant

(2] The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death. The complainant referred to in Section 256 has to be understood,

25. *Ashwini Kumar* v. *Dwijen Dey*, 1966
26. *Ali Dar* v. *Mobd. Sharif*, 1966 Cri Lj 412: AIR 1966 j&K 60.
27. *Associated Cement* Co. *Ltd.* v. *Kesavanand*, (1998) 1 SCC 687: 1998 SCC
28. *Ganesh Narayan Dangre* v. *Eknatb Hart Jkampe*, 1978 Cri Lj 1009, ion
29. *Abdul Hakim* v. *State*, 1973 Cri Ij 492 (Ail).

in the absence of any definition in the Code, as one whose sworn statement has been recorded under Section zoo.[30]

The discretion whether to adjourn or not under the above section has to be exercised with great care and caution. The statute itself contains the reason why such care should be exercised. In the first instance, the order is passed in the absence of a person who is vitally affected by it. Secondly, the consequences of the order are serious and once that order is made, it is no longer in the power of the Magistrate to correct the mischief even if he subsequently discovers that the complainant had very good reasons for his absence.[31 32] The order being one of acquittal, the complainant is prevented from taking fresh proceedings in respect of the offence complained by him. The section, no doubt, uses the words "shall acquit". But that compulsion arises after the Magistrate has exercised his discretion and come to the conclusion that there are no valid grounds for adjourning the case. This further emphasises the need for exercising great caution and examining the position very carefully before Magistrates proceed to acquit the accused in private complaints under the provisions of the above section.[52] The object of the section is to prevent the complainant being dilatory in the prosecution of his case. But it nowhere lays down that in ail cases, where the complainant is found to be absent on the date of hearing, the case has to be dismissed.[30 31 32 33] On the other hand, it vests discretion in the Magistrate to adjourn the hearing of the case to some other date, or to proceed with the case even if the complainant is not present at the trial of a summons case.[34] The court has power to grant exemption to complainant from appearance which may continue to be in force till it is revoked.[35]

A different type of situation may also be noted. If the complainant is absent when the case is called out and when no reason is shown to the

30. *Subbanna*

31. *Gaur*

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34. *State* v. *Gurdial Singh*, (1961) 1 Cri Lj

35. See, *Punja*

court for the absence of the complainant, naturally the court would presume that the complainant is absent because he does not wish to go on with the case, and accordingly an order of acquittal is made whatever the nature of the case may be.[36]

The power under the section has to be used judicially and judiciously and not in a manner that makes the remedy worse than the disease. It is not proper to throw out a case in a hasty or thoughtless manner when the complainant has proved his bona fides and shown himself vigilant in prosecuting the accused.[37] Absence of the complainant could be for umpteen reasons. It could be because he suddenly fell ill or met with an accident on the way to court or missed the bus and could reach the court only late. It could also be that he wanted to harass the accused, his enemy by dragging him to court successively or it could be that he filed the complaint only for the devilish pleasure of seeing his adversary, an apparently respectable man as an accused in the criminal court. It could also be that he was not aware of the responsibility that he owed to the court and of the waste of public time inherent in every adjournment of the case. In all such cases, the Magistrate is expected to take stock of the whole situation before he uses his discretion and decides the course to be followed. He should not view the absence of the complainant as a shortcut for disposal of the case.[38]

Sub-section (2) dearly provides that the provisions of sub-section (i) shall, so far as may be, apply to cases where the non-appearance of the complainant is due to his death. The nature of the case and the stage of the proceedings at which the death has occurred should be important considerations while exercising the discretion given to the court in this respect. In a case the Supreme Court upheld the acquittal of the accused in view of the absence of complainant for 15 times when the accused attended the court promptly.[39] The words "as far as may be" indicate that the Magistrate while deciding shall have to take into account the facts and circumstances of each case. In a case where immediately on the death of the complainant the accused was acquitted, it was held that acquittal under Section 256 does not allow Section 300 CrPC to operate and cause hindrance to file a new complaint.[40] Also in such a case a fit and proper person could be permitted to continue the complaint.[41]

36. *Pr*

37. *Govind*

38. *C.K. Sivaraman Achari* v. *D.K. AganmH,* 1978 Cri Lj 1376,

39. *S. Rama*

40. *Harendra* v. *Naipal Singh,* 1996 Cri LJ 91 (All).

41. *S. Reddappa* v. *Vtjaya* M., 1997 Cri Lj 98 (Kant); *Saroj Gupta* v. *State of U.P.,* 2006 Cri Lj 1045 (Ail).

17.7 Abatement of proceedings on death of the accused

The ultimate object of the criminal proceedings against an accused person is to determine whether he is guilty, and if found guilty, to punish him. Therefore, if the accused dies during the pendency of such proceedings, it is but reasonable that the proceedings should abate, as their continuance after the accused's death will be meaningless. This position being self-evident the Code has not made any specific provision regarding the abatement of criminal proceedings after the death of the accused person.

In case of proceedings in appeal the position is slightly different. In this connection Section 394 provides as follows:

Abatement of appeals

394. (1) Every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.

(a) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation.—In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

If there is an appeal against the sentence on the ground of its inadequacy under Section 377, or if there is an appeal in case of acquittal of the accused under Section 378, the appeal finally abates on the death of the accused person.[42] [S. 394(1)]

During the pendency of an appeal against acquittal filed by the complainant under Section 378(4), if the complainant dies, the appeal shall not abate under Section 394(1) as that sub-section applies only in case of death of the accused. Such an appeal shall not abate under Section 394(2) as that sub-section is applicable only in case of appeals other than those under Sections 377 and 378. The result is that an appeal against acquittal filed under Section 378(4) does not abate on the death of the complainant.[43] Every appeal against conviction also abates on the death of the accused except an appeal from a sentence of fine. [S. 394(2)]

The section provides that an appeal from a sentence of fine does not abate on the death of the appellant and further the proviso to the section enables any of the near relatives to obtain leave to continue the appeal.[44] The proviso to Section 394(2) provides that where the appeal is *against a conviction* and sentence of death or of imprisonment, and the appellant

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dies during the pendency of the appeal, any of his near relatives may, within 30 days of the death of the appellant, apply to the appellate court for leave to continue the appeal, and if leave is granted, the appeal shall not abate. The Supreme Court refused leave in a case where the son after 10 years of the appellant's death moved application for continuing the appeal and for condonation of delay so that in case of acquittal he could get consequential benefits. Neither any explanation nor any cause for not approaching the court within the prescribed period was offered by the applicant. The Supreme Court therefore held the appeal abated.[45] The expression "near relative" means a parent, spouse, lineal descendant, brother or sister. [Explanation to S. 394] The principles underlying the above section shall, it is submitted, apply to matters in revision also.

A sentence of fine does not abate on the death of the person sentenced, as it is not a matter which affects a person only, but affects his property.[46-47] [48] Though in a majority of cases where the appellant, who is sentenced to imprisonment, dies during the pendency of the appeal, the interest of his legal representatives in appeal may be purely sentimental, there are 0exceptional cases, where the interest may also be pecuniary. Thus, if the conviction is on a charge of murder of near relation, whose heir or one of whose heirs is the alleged murderer, he (if the conviction is not set aside) will be disqualified from inheriting his property. If he dies during the pendency of the appeal, his heirs have a pecuniary interest in prosecuting the appeal. If the appeal succeeds, their right of inheritance to the property of the deceased through the appellant will be saved.[47] [48]

The main object of the proviso appears to cover the abovesaid situation and as well to provide a machinery whereby the children or the members of the family of a convicted person who dies during appeal could test the conviction and get rid of the odium which would otherwise attach to them.[45] The requirement of leave would help in weeding out such appeals as are not likely to serve any of the above objectives.

The purpose of proviso to Section 394(a) CrPC is to enable the court to permit certain appeals. It is similar to jurisdiction under Article 13d of the Constitution.

In *Jugal Kishore Khetawat* v. *State of* W.B.[49], the Supreme Court permitted the appeal filed by the deceased to be continued by her husband after her death and formulated the position thus:

> *(a)* where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of

45. S.V. *Kameswar Rao* v. *State*, 1991 Supp (i) SCC 377:1991 SCC (Cri) 694:1992
46. *See*. 41st Report, p. 279, para. 31.61.
47. *See*, 41st Report, pp. 279-80, para. 31.62.
48. *See*, 41st Report, p. 280, para. 31.64.
49. (201.1} :rr SCC 502: {2011) 3 SCC (Cri) 587: 2011 Cri Lj 2170.

appellant, apply to the appellate court for leave to continue the appeal; and if leave is granted, the appeal shall not abate;

(b) the power to grant leave to continue the appeal Is conferred on the court and not on the Registrar under Order 6 of the Supreme Court Rules, 1966.

17.8 Conditional pardon to an accomplice

Sections 306 and 307 deal with the circumstances under which pardon can be tendered to an accomplice. The very object of these provisions is to allow pardon to be tendered in cases where a grave offence is alleged to have been committed by several persons so that with the aid of the evidence of the person pardoned the offence could be brought home to the rest.[50] The opening words of Section 306—"with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence ..."—also allude to the abovesaid objective of the provisions. An analysis of Sections 306 and 307 will bring out the following points:

(1) With a view to obtaining the evidence of, any person supposed to' have been directly or indirectly concerned in or privy to a certain type of offence, certain courts can tender pardon to such person on some conditions. [S. 306(1)] It is not necessary that the person is party to the offences. The person applying for pardon may not be actual culprit either.[51] The words *"supposed* to have been ... concerned in ..suggest that the person to whom pardon can be tendered must be one who is not actually convicted of the offence. The words "any person" are not so circumscribed as to denote a person who has actually been made an accused person. He may be any other person.[52] The provisions apply not only to a person summoned as an accused but also to others who are not so summoned.[53]

The legislative intent underlying these provisions is to make the approver to make full and complete disclosure in return for not proceeding against him. The Supreme Court in a case directed that the prosecution of the petitioner under Sections 2.77 and 278, Income Tax Act should not be continued if the accused makes the complete disclosure. It has also been declared that pardon does not operate in respect of transaction or act entirely unconnected with the offence in respect of which the pardon has

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been granted.[54] The fact that there is already a confession recorded under Section 164 cannot be a factor weighing against the tender of pardon.[54 55 56 57]

(2} The offences in respect of which pardon can be tendered are of three classes:

(/} offences triable exclusively by the Court of Session;[56] [S. 306(2)(a)]

{it) offences triable by the court of a special judge appointed under the Criminal Law Amendment Act, 1:952 (46 of 1952): [S.

{Hi) offences punishable with imprisonment which may extend to seven years or with a more severe sentence. [S. *A06{z){b)*\

This would show that the provisions regarding tender of pardon are applicable to offences of a serious nature.

According to Section 306(1) and (2) pardon can be tendered only in respect of the three classes of offences mentioned therein, and none other.[57] However, the provisions relating to joinder of charges have indirectly influenced the provisions regarding tender of pardon in such a way as to virtually extend their scope of operation. It is common knowledge that there are many transactions involving combination of offences exclusively triable by a Court of Session as well as other offences. And if such offences arise out of the same transaction it is not permissible (according to Section 209 read with other provisions relating to joinder of charges) to the committing Magistrate to split up the trial and to commit the accused to the Court of Session to stand trial only for those offences which are exclusively triable by a Court of Session. In such cases the committing Magistrate would necessarily be obliged to commit the whole case to the Court of Session. If that is so, even the offences which are not exclusively triable by a Court of Session, would be so triable by virtue of the fact that they arise out of the same transaction and are joined with other offences which are exclusively triable by the Court of Session. Thus, such offences would be covered by the first of the three categories of offences contemplated by Section 306(2) of the Code.[58]

(3} The Magistrates who are empowered to tender pardon are:
(z) the Chief Judicial Magistrate or a Metropolitan Magistrate,

{ii) the Magistrate of the First Class inquiring into or trying the offence. [S. 306(1)]

The Chief Judicial Magistrate or a Metropolitan Magistrate can tender pardon at any stage of the investigation or inquiry into, or the trial of [54 55 56 57]

54. See. *Dipesb Chandak* v. *Union of India*, Z004 Cri Lj 4605.

55. R. *Ravindmn Nairv. Supt. of Police*, 1981 Cri Lj 1424 (Ker).

56. In order to know such offences ***see,*** First Schedule,

57. ***State*** v. ***Hiralal Girdbarilal Kotbari,*** 1960 Cri LJ 524, 526: AIR i960 SC 360. 5S. ***Hasmukhlal*** v.

the offence[59]; and the Magistrate of the First Class can tender pardon at any stage of the inquiry or trial but not at the stage of investigation. [S. 306(1)] As the power conferred by Section 306(1) on the different class of Magistrates is concurrent and is of the same character, it follows that the power to tender pardon can be exercised by every one of the authorities mentioned therein subject to the limitations specified in the section itself. The mere fact that a Magistrate of the First Class inquiring into the offence has declined to grant pardon does not take away the power or jurisdiction of the Chief Judicial Magistrate to entertain a further application for grant of pardon. Though the Chief judicial Magistrate has got power to consider a further application, nevertheless, he will have due regard to the views expressed by the Magistrate for refusing to grant pardon.[60] It must, however, be stated that judicial propriety requires that if a higher authority has declined to tender pardon, a lower authority should not grant pardon except on fresh facts which were not and could not have been before the higher authority when it declined to tender pardon. Even if pardon has been refused on one occasion, a further request may be made before the same Magistrate or the Chief Judicial Magistrate. But such a further request can be entertained and considered only if fresh or additional facts are placed by the party concerned.[61] It may be appropriate to note here that according to clause (g) of Section 460 if any Magistrate not empowered by law to tender pardon under Section 306 erroneously in good faith does tender such pardon, his proceedings shall not be set aside merely on the ground of his not being so empowered.

(4) The pardon can be tendered to such a person (i.ea person supposed to have been directly or indirectly concerned in an offence) on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor in the commission thereof. [S. 306(1)]

(5) Every Magistrate who tenders a pardon under Section 306(1) shall record

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made. [S. 306(3)]

It is imperative on the part of the Magistrate granting pardon to record the reasons for doing so. If the reasons are not recorded the order of the Magistrate will not be a "speaking order". If it is not a "speaking order"

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it will be difficult for the revising court to revise the order in the absence of the reasons. Section 306(3) is a mandatory provision. If the Magistrate granting pardon does not assign any reasons, the whole order of the Magistrate can be quashed on this ground alone.[62] However, it has been held that when the facts leading to the pardon appear on the record, omission to state reasons is a mere irregularity which does not affect the right of the accused to be tried by the Sessions Judge.[63][64]

(6) Every Magistrate shall, on application made by the accused, furnish him with a copy of such record free of cost. [S. 306(3)] However, an accused shall have no *locus standi* to question a tender of pardon.[6A]

(7) Every person accepting a tender of pardon made under Section 306(1) shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial if any. [S. 3 06(4) (<2)] The expression "the court of the Magistrate taking cognizance of the offence" occurring in Section 306(4)^} would also include a Magistrate to whom the case is transferred for inquiry or trial.[65]

According to Section 209,[66] if the case in respect of an offence is exclusively triable by a Court of Session, the Magistrate taking cognizance of the offence shall commit the same to the Court of Session without examining any witness. However, when there is an approver, he shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial if any. [S. 306(4)(<z) above] The examination of the approver is a condition precedent for the committal. And a mere recording of a statement does not amount to examination for the purpose of this section.[67] The accused must be given an opportunity of cross-examination. It has also been held that Section 306 does not prohibit the Sessions Court from making over a case for trial by an Additional Sessions Judge or Assistant Sessions Judge.[68] Section 306 should be read in conjunction with Section 209. Any violation of the mandatory provisions, sub-section (4) and sub-section (5) of Section 306, by the Magistrate taking cognizance of the offence dearly amounts to an illegality which would vitiate the entire committal proceedings.[69]

The intended benefit for an accused for which Section 306(4)^) appears to have been enacted would seem to consist in:

62. *P.R. Sarkar* v. *State of Bihar*, 1974 Cri Lj 957. 958 (Pa

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64. *Raj Ambarisb* v. *State of W.B.*, 2003 Cri Lj 3830

65. *Pappayammal* v. *Arumughara*, 1979 Cri Lj 432, 435

66. For the text of S. 209, *see supra*, para. n.S. 0

67. *Uravakonda Vijayaraj Paul* v. *State of A.P.*, 1986

68. *State of Kerala* v. *Menu D. Surendran*, 1991 Cri Lj 27

69. *Ramasamy, re*, 1976 Cri LJ 770, 771-72 (Mad); see also

(i) that the approver would have to disclose his evidence at the preliminary stage before the committal order is passed, and

(h) that an accused thus not only knows what the evidence is against him but gets an opportunity to rely upon the deposition of an approver before the committing court for the purpose of proving the approver's evidence at the trial untrustworthy, if there are contradictions or improvements.[70]

There can be thus no question that if the approver is not examined at both the stages, as required by Section 3 06(4) (a), the accused in the trial would lose this benefit and it cannot be gainsaid that he would be prejudiced if he were to lose the opportunity of showing the approver's evidence unreliable.[71] It has been categorically declared by the Supreme Court that examination of approver in committing court as well as in trial court is mandatory even if he resile from his earlier statement.[72] It has also been held by the Supreme Court that the accused does not have the right to cross-examine the approver during investigation.[73]

{8) Every person accepting a tender of pardon made under Section 306(1} shall, unless he is already on bail, be detained in custody until the termination of the trial, [S. 306(4)(fi)]

Here custody means judicial custody and not police custody.[74] In this provision the legislature has not only used the word "shall" but it is preceded by the words "unless he is already on bail". These words clearly suggest that the legislature has prohibited the court from passing contrary orders.[75] The object of requiring an approver to remain in custody until the termination of the trial is not to punish the approver for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, to prevent him from the temptation of saving his erstwhile friends and companions and to secure his person to await the judgment of the law. The temptation on the part of an approver to flee from justice as a result of threat or coercion is supposed to outweigh all inducements to remain, growing out of pecuniary obligation, no matter to what amount.[76]

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This provision may seem rather harsh, particularly where the trial is prolonged, but in cases of extraordinary hardship, the approver can approach the High Court whose powers as to bail are very wide.[77]

It has been mentioned by some High Courts that but for the availability of the powers of High Court to release, in exceptional cases, the approver, the constitutionality of Section 306(4)^) might be open to serious challenge.[78]

(9) Where a person has accepted a tender of pardon made under Section 306(1) and has been examined under Section 306(4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,

(a) commit it for trial

(i) to the Court of Session if the offence is triable exclusively by that court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

.*(it)* to a court of Special Judge appointed under the Criminal Law Amendment Act, 1952., if the offence is triable exclusively by that court;

(b} in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself. [S. 306(5)]

When a Magistrate has tendered pardon the trial of the offence must not be by the Magistrate who has tendered pardon, or any other Magistrate but by a Court of Session[79]; but now under Section 306(5) certain cases can be made over to the Chief Judicial Magistrate.

However, if the Magistrate taking cognizance of the offence is Chief Judicial Magistrate, irrespective of the question whether the offences are triable by the Court of Session or not, there is no other option but to commit the case to the Court of Session.[80]

(xo) The appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration.[81 82]

But, if it is found that the approver cannot be declared as a reliable witness, then the question of seeking corroboration of his evidence does not arise.[82]

77. *See,* 41st Report, p. 196, para. 2.4.21.

78. *Prern Chand* v. *State,* 1985 Cri LJ 1534 (Del);

79. *Faqir Singh* v. *Emperor,* (1939) 40 Cri LJ 360, 364: AIR 1938 PC 266.

SO. *Chief judicial Magistrate, Trivandrum, re,* 19 88 Cri LJ 812 (Ker).

81. *Sarwan Singh Rattan Singh* v. *State of Punjab,* 1957 Cri LJ 1014, 1018: AIR 1957 SC 637, 641; see also,

82. *Krishnalal Naskar* v. *State,* 1982 Cri LJ 1305 (Cal); *Ram Narain* v. *State of*

(n) At any time after commitment of a case but before judgment is passed, the court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to any such offence, tender a pardon on the same condition to such person. [S. 307]

Pardon can be tendered under this section during a trial or even before trial. An approver once granted pardon is no more an accused. He is a witness. Proviso to Section 132, Evidence Act assumes that approvers would not be proceeded against on the basis of their statements.[83]

The phrase "same condition" appearing in Section 307 obviously makes reference to Section 306(1). The requirement of Section 306(4X12) is not a condition subject to which pardon is granted.[84]

In a case the accused was convicted of murder on the basis of his confession recorded under Section 164 of the Code though the circumstances were not suggestive of his involvement in the murder. The witnesses also doubted his involvement. The Madhya Pradesh High Court[S5] did not believe the prosecution story and acquitted him. The court pointed out that it would have been proper for the police to get the accused declared an approver under Section 306 of the Code rather than, their giving him the status of an approver on the basis of the accused's statement. The court declared that the police does not have power to do this.

An interesting question whether the special court dealing with corruption cases could grant pardon under Section 306 CrPC to an accused was answered in the affirmative by the Supreme Court in *Harshad S. Mehta* v. *State of Maharashtra.*[86]

17.9ial of person not complying with conditions of pardon

Trial of person not complying with conditions ofpardon

ction 308 provides for such trial. The section reads as follows:

308. (1) Where, in regard to a person who has accepted a tender of pardon made under Section 306 or Section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:

(1973) 3 SCC S05: 1973 SCC (Cri) 545, 552: 1973 Cri LJ 914.
State (Delhi Admn.) v. *Jagjit Singh*, 1989 Supp (2) SCC 770: 1990 SCC (Cri) 133: 1989 Cri Lj 986: *M.P. Gangadharan* v. *State*, 1989 Cri Lj 2455 (Ker).
State v. *Bigyan Mallik*, 1975 Cri Lj 1937, 1938 (Ori).
Shankar v. State of M.P.r 1997 Cri Lj 3876 (MP).
(2001) 8 SCC 257: 2001 SCC (Cri) 1447: 2001 Cri LJ 4259. See *also*, *Jasbir Singh* v, *Vipin Kumar Jaggi*, (2001) 8 SCC 289: 2001 SCC (Cri) 1525 equating S. 64, NDPS Act with S. 307 CrPC.

Provided that such person shall not be tried jointly with any of the other accused:

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in Section 195 or Section 340 shall apply to that offence.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under Section *164* or by a Court under subsection (4} of Section 306 may be given in evidence against him at such trial.

(3} At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made; in which case it shall be for the prosecution to prove that the condition has not been complied with.

{4} At such trial, the Court shall—

(1a) if it is a Court of Session, before the charge is read out and explained to the accused;

(b) if it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in. this Code, pass judgment of acquittal.

Sections 307 and 308 referred to in the above section have already been discussed in para. 17.8. Sections 195 and 340 have been discussed in para. 10.5(2). Section 164 has been discussed earlier in para. 8.11.

The provisions of the above section are mandatory and failure to comply with them would vitiate the trial. Sub-sections (3) and (4) are not just idle formalities. Sub-section (4) is there to ensure that once pardon has been tendered under Section 306, the accused person shall not be prosecuted for the offence in case he has complied with the conditions of the pardon. It is when the prosecutor certifies that the approver has not complied with the conditions that he can be tried for the offences.[87,88,89] If a person fails to support prosecution after becoming approver, he will be relegated to the status of an accused liable to be tried separately. The evidence given by him will be ignored though it may be used against him. The court's treating him as a hostile witness was wrong.[88] In a case an approver's evidence w*as not fully accepted by the High Court as it was of the view that he suppressed some material facts. Public Prosecutor did not take any action. Nor did the court withdraw pardon. In such a situation the High Court could exercise its inherent powers to do the needful.[89] It is for the court to satisfy itself as to whether the conditions have been complied with or not.

87. *See*, observations in *State (Delhi Admn.) wjagjit Singh*, 1989 Supp {2} SCC 770: 1990 SCC (Cri) 133: 1989 Cri Lj 9S6.
88. S. *And Raja* v. *State ofT. N.*, {2010} 8 SCC 233: {2010) 3 SCC {Cri} 801.
89. *Re?uika Bai* v. *State of Maharashtra*, {2006) 7 SCC 442: (2.006} 3 SCC (Cri) 290,

It is, therefore, mandatory on the court to question the accused and elicit the answer in this regard even before framing a charge.[90]

The section becomes applicable only in such cases where pardon is accepted by the accused person and he is examined as a witness.[91] The section is not dependent on Section 306(4} and for its application it is not necessary that the approver must have been examined both in the committing court and in the Sessions Court.[92]

The second proviso to sub-section (1) is quite important. The discretion in giving sanction for prosecuting the accused person for the offence of giving false evidence should be exercised by the High Court with extreme caution.[93]

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93. *State* v. *Atrna Ram,*

Chapter 18

Trial Procedures:
Preliminary Pleas to Bar Trial

Scope of the chapter **18.1**

In every type of trial when the accused appears or is brought before the court, he may raise certain preliminary pleas and object to his being tried by the court. For instance, it may be pleaded that the court does not have the jurisdiction or competence to try the accused for the offence alleged against him, or that the court cannot try the accused person unless certain disabilities from which he is suffering cease to exist or are removed. The accused person may raise the plea that proceedings against him are barred by the limitation of time prescribed by law or that he was already tried and convicted or acquitted of the same offence by a competent court and as such is not liable to be tried again. Some of these matters have been discussed, to an extent, in the preceding chapters. This chapter attempts to give a coherent picture of the pleas that can be taken in the initial stages to bar the trial.

It should not be supposed that the accused person alone will be interested in such pleas; the prosecution may also like to object to the trial, particularly when the question of jurisdiction or competence of the court is involved.

The Code is silent as to the stage of the trial at which any such plea can be taken. But considering the nature and object of such pleas, it appears reasonable that any such plea should be taken either in the beginning of the trial or soon after the charge is framed or the particulars of the offence alleged against the accused are explained to him.

18.2 Court without jurisdiction

Any party to the criminal proceedings can take the plea that the court has no jurisdiction to try the case. As mentioned earlier,[1] the jurisdiction of a criminal court is of two kinds. One has reference to the competence of the court to try particular kinds of offences. Section 26 read with Column 6 of the First Schedule determines the powers of a court to try specific offences whether under the Indian Penal Code or under any other law.[2] The legislature has conferred the powers on the courts according to its view with respect to the capability and responsibility of those courts; and higher the capability and sense of responsibility, the larger is the jurisdiction vested in the court over the various offences.[3] Therefore, this type of jurisdiction goes to the root of the matter, and if a court not lawfully empowered to try any particular offence proceeds to try such offence, a plea can be raised that the court is acting without jurisdiction and that the trial by such court is barred. This view is supported by Section 461 which provides by its clause (/) that if any Magistrate not empowered by law in this behalf, tries an offender his proceedings shall be void.[4]

It may be noted that under the Code no Executive Magistrate has any power to try an accused person on the charge of any offence. If such a Magistrate tries to do so, he would be acting without jurisdiction, and a valid objection can be raised against such trial.

According to Section 479, no judge or Magistrate can try any case to or in which he is a party or personally interested.[5] If a trial is initiated in violation of this rule, an effective plea can be taken against such trial.

In order to understand the full ambit of the preliminary plea regarding che competence and jurisdiction of the court, it would be desirable to recall the discussions in paras 14.2 and 14.3 and connect the same to the issue of preliminary pleas to bar trial.

It may be noted that in case the posts of Chief Judicial Magistrate and Additional District Judge are held by one person. Section 193 does not apply and appeals from the orders of the Chief Judicial Magistrate may lie to the Sessions Judge as the former is subordinate to the Sessions Judge.[6]

The other type of jurisdiction of the court is what is called the territorial or local jurisdiction. This jurisdiction is determined according to the rules contained in Sections 177 to 188 of the Code.[7] These rules have been enacted mainly for the purpose of convenience, keeping in mind the administrative point of view with respect to the work of a particular

court, and the convenience of the accused who will have to meet the charge levelled against him and the convenience of witnesses who have to appear before the court.[8 9] Any violation of these rules does not ipso facto vitiate the proceedings unless it has in fact resulted in failure of justice.[8 9] However, if the objection as to the lack of territorial jurisdiction is taken up before or at the time of the commencement of the trial, such objection shall be sustained and no shelter will be allowed to be taken behind Section 46a.[10]

Accused person suffering from certain disabilities

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(i) Section 303 confers an important right on the accused person to be defended by a counsel of his choice;[11] and if the accused has not sufficient means to engage a lawyer, Section 304 requires the court under certain circumstances to assign a pleader for his defence at the expense of the State.[12] Further, the Supreme Court, by a liberal and creative interpretation of Article zx of the Constitution, has now recognised that every indigent accused person has a fundamental constitutional right to get free legal services for his defence.[13] If the court fails to assign a lawyer to an indigent accused person, such an accused person, it is submitted, can legitimately object to the commencement or continuance of the trial. The non-compliance with Section 304 or with the constitutional mandate, despite the objection raised before or at the commencement of the trial will vitiate the criminal proceedings.[14]

(z) Where the accused person is of unsound mind and consequently incapable of making his defence, the Code makes special provisions by Sections 328 to 332 to deal with such a case and requires the court to postpone the trial and to resume it only after the accused person has ceased to be of unsound mind.[15] These matters have already been discussed in Chapter 14, and they are recalled here to indicate that the accused person may take the plea objecting to the commencement or continuance of the trial during the time he is of unsound mind.

8. *Purushottamdas Dalmia* v. *State of W.B.,* {1961) 2 Cri Lj 728: AIR 1961 SC 1589.

9. For the text of S. 462, *see supra,* para. 9.13.

10. *Ibid;* **see also.** *Sukhdeu Singh* **v.** *Sukhvinder Kaur,* **1974 Cn LJ 229.** 230 (P&H); *Badharan;* v. *Rahim Sardar,* AIR 1946 Cal 459: {1946) 47 Cri Lj 1020; *State* v. *Tavara Naika,* T959 Cri Lj 1004: *'ll. Chandra Prakasb Go j we* **l v.** *Inspector ofPolice, ZOQ6* **Cri Lj 1791 (Mad).**

12. For detailed discussion on this point, *see supra,* paras 14.10 and 14.1 x. Also see, *Rajindar Singh* v. *State of* W. B., 2004 Cri Lj

13. *See supra,* para. 14.11.

14. See, discussions in *Mobd. Hussain* **v.** *State (Govt, of NCT of Delhi),* (2012) 9 SCC 408: {z0i 2} 3 SCC {Cri} 1159: 2012 Cri Lj

15. For detailed discus sio n of these provisions, see *supra,* para. 1:4.8.

18.4 Criminal proceedings barred by limitation of time

For the first time in India, the Code has enacted some general rules incorporating the law of limitation for taking cognizance of the crimes. Before the enactment of the Code, though periods of limitation were prescribed for prosecution of offences under some special or local laws,[16 17 18] it was generally not considered desirable to extend the law of limitation to criminal cases. For, in a criminal prosecution, apart from the injured party and the offender, the community as a whole has an interest in the detection and punishment of the offender, and this interest may be defeated if the mere expiry of time is allowed to operate as a bar to prosecution. Moreover, in a civil case there is always a victim with an active personal interest in seeking his remedy, and the wrongdoer is generally known; but in many criminal cases the wrongdoer may not be known or else may be untrace- abie due to his absconding or for other reasons.[17 18] On the other hand, the opposite considerations become stronger and weighty as time moves on. The major considerations for prescribing limitation for criminal cases are as follows:

(i) As time passes the testimony of witnesses becomes weaker and weaker because of lapse of memory and evidence becomes more and more uncertain with the result that the danger of error becomes greater.

{it) For the purpose of peace and repose it is necessary that an offender should not be kept under continuous apprehension that he may be prosecuted at any time particularly because with the multifarious laws creating new offences many persons at some time or the other commit some crime or the other. People will have no peace of mind if there is no period of limitation even for petty offences.

{Hi) The deterrent effect of punishment is impaired if prosecution is not launched and punishment is not inflicted before the offence has been wiped off the memory of persons concerned.

{iv) The sense of social retribution which is one of the purposes of criminal law loses its edge after the expiry of a long period. *iv)* The period of limitation would put pressure on the organs of criminal prosecution to make every effort to ensure the detection and punishment of the crime quickly.[IS]

Statutes of limitation shut out belated and dormant claims in order to save the accused from unnecessary harassment. They also save the accused from the risk of having to face a trial at a time when his evidence might have been lost because of the delay on the part of the prosecutor.[19] The object which the statutes seek to subserve is dearly in consonance with the

16. for instance *see,*

17. 42nd Report of the Law

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19. S.M. *Vikal* v. A.L.

concept of fairness of trial as enshrined in Article 21 of the Constitution. It has been opined that the rules of limitation confer a right on the accused to plead that an offence or offences disclosed in a complaint should not have been taken cognizance of as the prosecution was barred by limitation.[20] It is, therefore, of the utmost importance that any prosecution, whether by the State or a private complaint, must abide by the letter of law or to take the risk of the prosecution failing on the ground of limitation.[21]

The Code has accepted the principle of limitation in respect of less serious offences, *i.e.* offences punishable with fine only or with imprisonment up to three years. It is said that the question of extending the law of limitation to graver offences might be taken up later on in the light of the experience actually gained.[22]

The provisions regarding limitation are contained in Sections 467 to 473, and the accused, depending upon these sections, may, in an appropriate case, take the plea that the criminal case against him is barred by the prescribed period of limitation.

An analysis of the abovesaid sections will bring out the following points:

(l)Basic rule regarding limitation.—Section 468 contains the basic rule which provides that except as otherwise provided elsewhere in the Code, no court after the expiry of the period of limitation shall take cognizance of an offence punishable with fine only or with imprisonment up to three years.

For the purposes of the above rule, the period of limitation as provided by Section 468(2) shall be

{a) six months, if the offence is punishable with fine only;

(6) one year, if the offence is punishable with Imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

For the purposes of the abovementioned Section 468, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which Is punishable with the more severe punishment or, as the case may be, the most severe punishment. *[See,* S. 468(3)]

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For the purposes of the provisions relating to limitation *[i.e,* Ss. 468- 473], unless the context otherwise requires, "period of limitation" means the period as specified above. [S. 467]

The basic rule mentioned above is subject to the other provisions relating to limitation contained elsewhere in the Code. For instance, different periods of limitation have been prescribed for certain offences by Section 198(6) or Section 199(5}, and those will not be affected by the basic rule mentioned above.[23]

The bar of limitation under Section 468 is imposed not on the filing of the complaint but on taking cognizance thereof by the court, that is, when the Magistrate applies his mind to the contents of the complaint, information or police report or on his own knowledge with a view to deal with the offence. What the court has to examine is whether on the date of taking cognizance by it, the offence was or was not within the period of limitation prescribed by Section 46s.[24 25]

Section 468 as it stands today and interpreted by the Delhi High Court may possibly cause some hardship and injustice to a diligent complainant under certain circumstances. The complainant might have lodged the complaint well in time, but the Magistrate receiving the same, instead of taking cognizance of the offence mentioned therein, might send it to the police under Section 156(3) for investigation into the case; and by the time the police report back after investigation, the period of limitation might have expired; or there might be other reasons (for which the complainant is not responsible) for not taking cognizance of the offence on the receipt of the complaint and the subsequent taking of cognizance of the offence might get time-barred.[2A] Probably, Section 473[26] which gives discretion to court to extend the period of limitation may, to an extent, be useful to remove the injustice and hardship caused to the complainant in such situations.

It has been clarified by a five-member Bench of the Supreme Court in *Sarah Mathew* v. *Institute of Cardio Vascular Diseases*[27] *(Sarah Mathew case)* that for the purpose of computing the period of limitation under Section 468, the relevant date is date of filing of the complaint or the date

23. For the
24. ***Oriental Bank of Commerc***
25. The unc onscienti ous St are officials may be
26. ***See infra,***
27. (2014) 2 SCC

of institution of prosecution and not the date on which the Magistrate takes cognizance.

It is interesting to note that the Supreme Court has ruled that the language of Section 468(3) makes it imperative that the limitation period for taking cognizance in Section 468 is in respect of the offence charged and not in respect of the offence finally proved.[28]

Where the court takes cognizance of a major offence against an accused person, but finds him guilty of a minor offence, it is open to the accused to plead that conviction for minor offence is bad if the complaint or chal- lan is filed against him beyond the period of limitation prescribed for the minor offence subject to the residual power of the court to exercise its discretion under Section 473.[29]

Section 468 imposes a bar on taking cognizance of an offence after the expiry of the period of limitation. Here the "taking cognizance" is of the offence and not of the offender. Therefore, if during the pendency of the criminal proceedings, but after the expiry of the period of limitation, the court decides to proceed against some other persons as accused persons in accordance with the provisions of Section 319, the bar of limitation will not apply in respect of such additional accused persons, because even according to Section 319(4) the case is to proceed against such persons as if they had been accused persons when the court took cognizance of the offence upon which the inquiry or trial was commenced.[30] Moreover, Section 463 begins with the words "Except as otherwise provided elsewhere in this Code" and Section 319 is one such exception. Therefore, the bar of limitation will not apply to a case where the Magistrate proceeds against a person under Section

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The operation of the basic rule has been excluded in respect of certain economic offences by a special law, namely, the Economic Offences (Inapplicability of Limitation) Act, 1974. Section 2. of the Act provides that nothing contained in Sections 467 to 473 of the Code shall apply to:

(i) any offence punishable under any of the enactments specified in the Schedule,[32] or

28. *State ofH.P.* v. *Tara Dutt,* (2000) 1 SCC 2,30: 2.000 SCC (Cri) 125.
29. *K. Hanumantba Rao* v. K. *Narasimha Rao,* 1582 Cri Lj 734, 742 (AP); *State of Punjab*
30. *Sidhesbwar Prasad* v. *State of Bibar,* **1979 Cri LJ 767 (Pat).**
31. *Basudeo Mondal* v. *Dud Kumar Pramanick,* 1982 Cri Lj 1654, 1656 (Cai).
32. The Schedule contains the following enactments:
    (1) The Indian Income Tax Act, 1922 (n of 1922)
    (1-A) Cl. *(a),* S. 63, Copyright Act, 1957
    (2) The Income Tax Act, 1961 (43 of 1961)
    (2-A) The Interest Tax Act, 1974
    (
    2
    -

{it) any other offence, which under the provisions of the Code, may be tried along with such offence.

In addition to the abovementioned Economic Offences (Inapplicability of Limitation) Act, 1974, there might be State enactments[33] excluding the operation of the periods of limitation as prescribed by the Code, in certain cases.

The Supreme Court has excluded[34] operation of limitation in respect of offence under Section 498-A IPC observing:

> when Section 498-A of the Indian Penal Code is brought to use in the case of cruelty on women, the law of limitation is not that rigid so as to non-suit the aggrieved wife. A fair dose of liberalities is warranted, so that the law as an instrument comes in aid of the aggrieved due to gender inequalities.

It has been decided that if there is conflict between the periods of limitation prescribed in the Code and a local law, having regard to Section 4(a) of the Code, the limitation prescribed by local law shall be applicable.[36]

{2} *Commencement of the period of limitation*.—The provisions relating to the commencement of the period of limitation are contained in Sections 469 and 472. These sections are as follows:

Commencement of the period of limitation

469. (1) The period of limitation, in relation to an offender, shall commence,—

(a) on the date of the offence; or

Ib) where the commission of the offence was not known to the

(4) The Wealth Tax Act, 1957 (27 of 1957}
(5) The Gift Tax Act, 195S (18 of 1958)
(6) The Central Sales Tax Act, 1956 (74 of 19^6
(7) The Central Excises and Sait Act, 1944 (1 of 1944)
(7-A) Chap. V, Finance Act, 1994
(8) The Medicinal and Toilet Preparation (Excise Duties) Act, 1955 (16 of 1955)
(9) The Customs Act, I962 (52 of 1962)
{10) The Gold (Control) Act, 1968 (45 of 1968)
(11) The Imports and Exports (Control) Act, 1947 (18 of 1947)
(12) The Foreign Exchange Regulation Act, 1947 (7 of 1947)
(13) The Foreign Exchange Regulation Act, 1973 (46 of 1973)
(14) The Capital Issues (Control) Act, 1947 (29 of 1947)
(15) The Indian Stamp Act, 1899 (2 of 1:899)
(16) The Emergency Risks (Goods) Insurance Act, 1962 {62 of 1962)
(17) The Emergency Risks (Factories) Insurance Act, 1962 (63 of 1962)
(18) The Emergency Risks (Goods) Insurance Act, 1971 (jo of 1971)
(19) The Emergency Risks (Undertakings) Insurance Act, 1971 (51 of 1971)
(20) The General Insurance Business (Nationalisation) Act, 1972 (57 of 1972}
(21) The Industries (Development and Regulation) Act, 1951 {63 of 1951).

33. *See for instance,* the Maharashtra Acts 24 of 1976, 44 of 1977 and 22 of 1982.
34. *Vijaya* v. *Laxmamao,* (1998) 8 SCC 415: 1998 SCC (Cri) 1543; see also, *Arun Vyas* v. *Anita Vyas,* (1999) 4 SCC 690: 1999 SCC (Cri) 62.9.
35. *Vijaya* v, *Laxmamao,* (1998) 8 SCC 415: 1998 SCC (Cri) 1543.
36. *S. Ramachandm Reddy* v. *P.N. Ravindra Reddy,* 1991 Cri LJ 16x9 (AP).

such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day- on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from •which such period is to be computed shall be excluded.

472. In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

Continuing offence

The exact purpose of clauses *{a), {b}* and *(c)* of Section 469(1) providing three alternative dates for the commencement of the period of limitation is not easy to understand. The sub-section does not give any specific direction, like "whichever is later" or "whichever is earlier", for choosing one of the three dates. If the choice is to be given to the accused, he will invariably choose clause *{a),* as that would be most advantageous to him in every case; and in that event clauses (b) and *(c)* will become superfluous. On the other hand, if the choice is of the prosecution, it would always choose clause *(c)* as that would give the longest time to the prosecution; and in that case, clauses *{a)* and *(b)* will become redundant. In course of time these problems will come up before the courts for solutions. The courts, it appears, are more likely to take the view that the starting point for the purpose of limitation should be the date on which knowledge of the identity of the offender was known either to the aggrieved party, or to the officer investigating the offence.[37] [38] And in that case, clauses *{a}* and *(b)* will remain only as useless appendages.

The question as to what is the starting point of the period of limitation within the meaning of Section 469, is the question of some significance and is also one of widespread application in the administration of criminal law.

However, except in the lone decision of the Bombay High Court in *State of Maharashtra* v. *P.D. Pujari*[38]> it had not been directly considered in any decision of the Supreme Court till 2013 or of any other High Court. Even the abovementioned decision of the Bombay High Court does not seem to succeed in fully explaining the inter-relation and the action and reaction inter se between clauses *(a), (b)* and (c) of Section 469(1).

37. A recommendation to this effect was in fact made by the Law Commission but unfortunately it was not accepted in that form by the legislature. [For the recommendation, *see,* 42nd Report of the Law Commission of India on the Indian Penal Code, 1971, p- 348, para. 24.19.]

38. 1979 Cri LJ 1152 (Bom). *See,* observations in *Surinder Mohan Vikal* v. *A.L. Chopra,* (1978) 2. SCC 403: 1978 SCC (Cri) 215: 1978 Cri Lj 764: AIR 1978 SC 986; *State of Punjab* v. Sarwan *Singh,* (1981) 3 SCC 34: 1981 SCC (Cri) 62.5: 1981 Cri LJ 722; also see, *Anand* R. *Nerkar* v. *Rahimbi Shaikh Madar,* 1001 Cri LJ 557 (Bom); *Kamiabai* v.

The Bombay High Court, after considering the scheme and object of the provisions relating to limitation, had concluded in that case as follows:[39] [40] [41]

(i) The period of limitation will commence, under Clause *(a)* of sub-section (i) of Section 469, "on the date of the offence', if, on that date itself, there is knowledge also of the offence as also identity of the offender. Clause *(a)* will not apply, if, on the date of the offence, there is no knowledge of the offence nor will it apply, if, on the date of the offence, there is knowledge of the offence but there is no identity of the offender. Clause *(a)* presupposes knowledge of the offence as also identity of the offender.

(ii) The period of limitation will commence, under Clause *(b)* of sub-section (1) of Section 469, 'on the first day on which the offence comes to the knowledge' of the person aggrieved thereby or of any Police Officer, if on that date itself the identity of the offender is also known. Clause {b) will not apply, if, on the date specified therein, though there is knowledge of the offence, there is no identity of the offender *i.e.* though the offence is known, the offender is not known. Clause *(b)* presupposes identity of the offender.

{in) The period of limitation will commence, under Clause (c) of sub-section (1) of Section 469 [4]on the first day on which the identity of the offender is known to the person aggrieved by the offence or to the Police Officer making investigation into the offence, whichever is earlier[5]. Clause (c) presupposes knowledge of the offence.

A close examination of the above conclusions would reveal that the real terminus a quo for the commencement of the period of limitation is the point of time at which the aggrieved person or a police officer comes to know of the identity of the offender. Consequently clauses *(a)* and *(b)* of Section 469(1) appear to be superfluous. In these circumstances, one might recall the original formulation of the rule as recommended by the Law Commission. The rule originally formulated was as follows:

> 513. *Commencement of the period of limitation.*—(1) The period of limitation commences, in relation to any offender, from the day on which his participation in the offence first comes to the knowledge of a person aggrieved by the offence or of an officer investigating the offence.
>
> (2.)... -[40] [41]

The expression "person aggrieved" appearing in clauses *[b]* and *(c)* of Section 469(1) has not been defined or explained in the Code.

According to the decision of the Madras High Court in *Sulochana* v. *State Registrar of Chits*[m] *(Sulochana),* these words should be given a limited or restricted coverage to confine the same to a person who is personally and directly affected by an offence, and not to any member of the

39. *State of*
40. *See,* 42nd Report of the Law
41. *Sulochana* v.

public or even an officer who is charged with the duty of enforcing the prohibitory regulations under a statute.

The Delhi High Court, however, could not subscribe to the view taken by the Madras High Court in the abovementioned *Sulochana case.* According to the Delhi High Court, the simple meaning of the words "person aggrieved" in the context of Section 469 should be the person having suffered loss or injury, a victim of the crime; and this will also include a person or an authority who is by or under any law charged wfith the duty to administer it and to prosecute those who violate its provisions.[42]

It is submitted that the expression appears to be of wide import and should not be subjected to restrictive interpretation. Therefore, the view-expressed by the Delhi High Court is preferable to the one expressed by the Madras High Court, and is more likely to be followed in future.

If the offence is a continuing one and continues at the moment of taking cognizance thereof, then, in view of Section 47Z, the cognizance will be within limitation irrespective of when the offence came to be committed for the first time or when it first came to the knowledge of the person aggrieved or when the complaint was lodged.[43]

A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and re-occurs, there is the offence committed.[44] It has been opined that it is not the continuing liability for punishment but the liability for continuing punishment which makes an offence a continuing offence.[45]

(3) *Exclusion of time in certain cases.*—The provisions relating to exclusion of time in computing the period of limitation are contained in Sections 470 and 471. These sections are as given below:

Exclusion of time in .certain cases

470. (1) In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender, shall be excluded:

42. ***Oriental Batik of Commerce*** v. ***DDA,*** 1982 Cri LJ 2233 (Del).

43. ***Ibid.*** 2233.

44. ***State of Bihar*** v. ***Deokaran Nenshi,*** (1972) 2 SCC 890: 1973 SCC (Cri) 114, 116: 1973 Cri Lj 347; *United Savings* & *Finance Co. (P) Ltd.* v. *RBI,* 1980

45. *See,* dis cussions in *Ramnuggar Cane & Sugar Co. Ltd.* v. *Registrar of Companies,* 1981 Cri LJ 1007 (Cal).

Provided that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(z) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(3) Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Exclusion of date on which Court is

Explanation.—In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.

(4) In computing the period of limitation, the time during which the offender—

(a) has been absent from India or from any territory outside India which is under the administration of the Central Government, or

(b) has avoided arrest by absconding or concealing himself, shall be excluded.

Extension of period of limitation in certain cases

471. Where the period of limitation expires on a day when the Court is closed, the Court may take cognizance on the day on which the Court reopens.

Explanation.—A. Court shall be deemed to be closed on any day within the meaning of this section, if, during its normal working hours, it remains closed on that day.

{4) *Extension of the period of limitation in certain cases.*—Section 473

46. See, joint Committee Report, p. xxxi.

in solving the problems and difficulties caused by ambiguous or defective drafting of the provisions relating to limitation.

The section begins with a non-obstante clause; and if Section 468 is read with this section, it would be obvious that while Section 468 prohibits the court from taking cognizance of an offence beyond the prescribed period of limitation, Section 473 enables the court to take cognizance after the expiry of the period of limitation in case the court is satisfied that the delay has been properly explained or that it is necessary so to do in the interests of justice. The discretion given to the court in this connection by Section 473 is very wide, though it has to be exercised judicially after considering the facts and circumstances of the case.[47] There cannot be any hard and fast rule as to what constitutes sufficient cause to "properly explain" the delay occasioned or what is "necessary so to do in the interests of justice". It must be determined by a reference to the facts and circumstances of each particular case;[48] and it is impossible to encase judicial discretion in a straitjacket.[49] It has been held that the provisions of Section 473 should be liberally construed so as to advance substantial justice when no negligence or inaction or want of bona hides is imputable to the prosecutor, but cannot be construed too liberally because the government is the prosecutor or prosecution is upon police report.[50] The law of limitation operates equally for or against a private individual as also the State.[51] It should also be remembered that the salutary purpose of the law of limitation should not be allowed to be circumvented by taking recourse to the magic words of "interest of justice", unless there is manifestation of compelling and justifiable reasons.[52] [53]

Whenever a complaint or a challan is filed at the instance of any person or any police officer, the court must first see whether Section 468 is attracted or not. If it does, it had been suggested that the court should not take cognizance of the offence but give an opportunity to the person or the police officer filing the complaint or challan to satisfy the court on the point of limitation for purposes of condonation of delay.[35] When a complaint or a challan is ex facie barred by limitation, it is necessary for the prosecution to state in the complaint or challan itself giving explanation why delay should be condoned. If the complaint or challan is silent in this regard, it is necessary for the prosecution to file a separate application [47] [48] [49] [50] [51] [52] [53]

47. *K.*
Hanu
48. *A.K*
Thaga
49. *G.D. Iyer* v. *State,* 1978 Cri LJ uSo, 1183 (Dei).
50. *Krishna Sanghi* v. *State of* M.P., 1977 Cri Lj 90, 92 (MP).
51. *K. Hanumantha Rao* v. K. *Narasimha Rao,* 19S2 Cri Lj 734, 737 (AP).
52. *S.K. Bajaj* v. *D.K. Bhattacharya,* 1982 Cri Lj 210, 211 (Cal).
53. *Krishna Sanghi* v. *State of* M.P., 1977 Cri Lj 90 (MP).

for condonation of delay giving explanation for delay. In the absence of any statement in the complaint or challan explaining the delay or in the absence of a separate application for condonation of delay, it cannot be said that the court has condoned the delay by the mere fact of its having taken cognizance of the offence. Section 473 enjoins a duty on court to examine not only whether such delay has been explained but as to whether it is the requirement of justice to condone or ignore such delay. And it is for the applicant to make out a case for condonation as in the case of application of Section 5, Limitation Act/[4] It is incumbent upon the court to show on record that it applied its mind to the question of limitation and was satisfied that on the facts and circumstances of the case that the delay has been properly explained. It is also incumbent upon the court to indicate on record that either on the request of the party or on its own accord, it was considered necessary to take cognizance in the interest of justice. In the absence of any such record, it cannot be presumed that the court has taken cognizance on the ground that it was necessary for the court to do so In the interests of justice/[3] If after the expiry of the period of limitation, cognizance of an offence is taken by the court without applying its mind to the question of limitation, then the act of taking cognizance of the offence and any proceeding thereafter would be illegal and would be considered to have been done without jurisdiction/[6]

"When the court condones the delay and extends the time under Section 473, it means it is interfering with the rights of the accused which have vested in him by virtue of the expiry of the period of limitation. Therefore, even though the Code does not contain any procedure for hearing the accused on the question of condoning the delay under Section 473, the principles of natural justice require that the condonation of the delay and extension of time should be done only after giving a reasonable opportunity to the accused person to oppose the plea of the prosecution for the condonation of the delay/[7] It has, however, been held that failure to give opportunity may not render condonation of delay invalid.[5][5 4][5 5][5 6][5 7][5 8]

54. *Vanka Radhamanohari* v. *Vanka Venkata Reddy*, (1993] 3 SCO
55. *Jethmal Himmatmal Jain* v. *State of Maharashtra*, 19S1 Cri LJ 1813, 1816 (Bom); see also, *Panney Singh* v. *State of Rajasthan*, 19So Cri LJ 339, 341 (Raj); *State of Karnataka* v. *Vedavati*, 1978 Cri LJ 1375 (Kant); *Prakash Chandra Sbarmaw Kaushal*
56. *Ghansham Dass* v, *Sham SnndarLai*, 1982 Cri Lj 1717,17 18 (P&H); *Subash ChandraMohapatra* v.*M.S.Jaggi*, 1982 Cri LJ
57. *Jethmal Himmatmal Jain* v. *State of Maharashtra*, 1981 Cri LJ 1813, x818 (Bom); *Panney Singh v. State of Rajasthan*, 1980 Cri LJ 339, 344 (Raj); *Prakash ChandraSharma* v. *KaushalKishore*, 1980 Cri Lj 578, 580 (All); *Bharat Hybrid Seeds & Agro Enterprises* v. *State*, 1978 Cri Lj 61, 62 (AP); *Krisktta Sanghi* v. *State of M.P.*, 1977 Cri LJ 90, 92 (MP); *Mangu Ram* v. *State of Rajasthan*, 1993 Cri Lj 1972 (Raj); *Appu Ramani* v. *State*, 1993
58. *State of Karnataka* v. *Laxminarayana Bhat*, 1991 Cri LJ 2126

The question then arises as to whether such an opportunity is to be given to the accused person before taking cognizance of the offence or would it be sufficient if he is allowed to raise this defence of limitation after the cognizance is taken and he appears or is brought before the court for trial. As the delay has to be condoned before the cognizance of an otherwise time-barred offence can be taken,[59] the former course has been favoured by the High Courts of Allahabad, Bombay, Rajasthan and Madhya Pradesh.[60] This view is legally unexceptionable. The Madras, Calcutta and Andhra Pradesh High Courts are, however, inclined to accept the latter view, as there is nothing in Section 473 to show that the court's powers to extend the period of limitation are limited in any man- ner with reference to time factor.[61] This view appears to be more expedient as in such a case the necessity of raising the plea of limitation may arise only in those cases where the cognizance has been actually taken and the accused is required to answer the charge.

The Code does not provide an opportunity to the accused of being heard on the bar of limitation enacted under Section 468 before taking cognizance of any of the offences mentioned in Section 468(2). The Code does not also envisage issue of any process against the accused before taking cognizance of the offence. It has, therefore, been suggested that any cognizance of an offence taken by the court is subject to defeasance of the cognizance on the ground of limitation and that it is open to the accused to plead before the court in response to the process issued to him that the complaint or the chailan hied against him and taken cognizance of by the court is barred by limitation. Such a plea can be raised by the accused at any time during the trial.[62 63] It seems that the difficulties expressed by the various High Courts could be avoided by the Supreme Court's ruling in the *Sarah Mathew case*[6:]\ wherein the five-member Bench ruled that the computation of the period of limitation under Section 468 should be from the date of filing complaint or date of institution of prosecution rather than the date of taking cognizance. [59 60 61 62 63 64]

59. ***Kaihamutbu*** v. ***BaJammaf*** 1987 Cri L] 360 (Mad) apparently following ***Surindar Mohan Vikai*** v. ***A.I.. Chopra,*** (1978) 2 SCC 403: 1.978 SCC (Cri) 215: 1978 Cri LJ 764: AIR 1978 SC 986.
60. *Panney Singh* v. *State of Rajasthan*, 1980'Cri Lj 339, 344 (Raj); *jethmal Hrrnmatmai Jain* v. *State of Maharashtra*, 1981 Cri Lj 1813, 1818 (Bom); ***Krishna Sanghi*** v. ***State of M.P.,*** 7977 Cri Lj 90, 92 (MP). But the M.P.
61. C ***Hanuma8tha Rao*** v. ***K. Narasimha Ran,*** 7982 Cri Lj 734, 742 (AP): ***Cush row Rttssy Irani*** v. ***State,*** 1977 Cri Lj 160. 161-62 (Cal); ***Suiochana*** v. ***State Registrar of Chits,*** 1978 Cri LJ u6, 120 (Mad).
62. *K. Hanumantha Rao* v. *K. Narasimha Rao*, 1982 Cri. Lj 734, 742 (AP); ***Suiochana*** v. ***State Registrar*** o/ ***Chits,*** 7978 Cri Lj 116, .720 (Mad).
63. (2014} 2 SCC 62.
64. *Ihid.*

18.5 Pleas of "autrefois acquit" and "autrefois convict"

These pleas are taken as a bar to criminal trial on the ground that the accused person had been once already charged and tried for the same alleged offence and was either acquitted or convicted. In *Yus of alii Mulla Noorbhoy* v. R.[65], the court explained the common-law plea of *autrefois acquit* or *autrefois convict*. It can only be raised where the first trial was before a court competent to pass a valid order of acquittal or conviction. Unless the earlier trial was a lawful one which might have resulted in a conviction the accused was never in jeopardy. In the instant case the trial which resulted in acquittal was not by a competent court inasmuch as the first trial was without sanction.[66] These rules or pleas are based on the principle that "a man may not be put twice in jeopardy for the same offence". Article 20(2) of the Constitution recognises the principle as a fundamental right. It says, "no person shall be prosecuted and punished for the same offence more than once". While Article 20(2} does not in terms maintain a previous acquittal, Section 300 of the Code fully incorporates the principle and explains in detail the implications of the expression "same offence".[67] Six illustrations accompany this section explaining in concrete terms the different situations which the courts may have to deal with.[68] An analysis of Section 300 will bring out the following points:

(1) The basic rule is that "a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence". [S. 300(1)]

For the purposes of the above basic rule and also for the purposes of the other parts of Section 300, the term "acquittal" has been explained in negative terms by saying that the dismissal of a complaint, or the discharge of the accused is not "acquittal". [Explanation to S. 300] The reason is, the dismissal of a complaint or the discharge of the accused is not considered as the final decisions regarding the innocence of the accused person. It may, however, be noted that when a court applies a wrong provision of law erroneously, it would be deemed that the order in effect was one under the provision of law applicable to the facts of the case. Where in a summons case, the Magistrate passed an order of "discharge" under Section 245(2) owing to the absence of the complainant the order of "discharge" under Section 245(2) must be read as an order of acquittal passed under Section 256.[69]

65. (1948-49)
66. See also,
67. *See,*
68. *See,* 41st
69. *Rabin*

The word "tried" in Section 300(1) does not necessarily mean tried on the merits. The composition of an offence under Section 320, or a withdrawal from the prosecution by the Public Prosecutor under Section 32.1, would result in an acquittal of the accused even though the accused is not tried on merits. Such an acquittal would bar the trial of the accused on the same facts on a subsequent complaint.[70]

With regard to the meaning and scope of the word "tried" in Section 300(1), there are two views. One view is that the accused must be present in court on being summoned, before it can be said that the trial has commenced; and the other is that once the court has taken cognizance of a complaint or a criminal case and has ordered issue of process for the accused to appear, it has taken steps towards the trial and what it has done is proceedings in the nature of a trial. The latter view accords more with the explanation to Section 300 because if it was the intention of the legislature to exclude acquittals under Sections 256 and 257[71] (such acquittals are possible under the sections even before the accused makes his appearance in obedience to summons) from the purview of Section 300, that could have been as specifically provided as the discharge of the accused or the dismissal of a complaint as has been done in that explanation.[72]

In order to get the benefit of the basic rule contained in Section 300(1) it is necessary for an accused person to establish that he had been tried by a "court of competent jurisdiction" for an offence. It has been repeatedly held by the Supreme Court that an adjudication before a collector of customs is not a "prosecution" nor the collector of customs a "court".[73] However, the expression "competent court" to try an offence should not be narrowly interpreted as to involve merely the consideration of the status or the character of the court, but in determining the competence it must also be considered whether the court though otherwise qualified to

Hindustan Motors Ltd., 1970 Cri Lj 659 (AP). *See* also, *Keciyo Coconut Oils (P) Ltd.* v. *State of Kerala*, 2002 Cri LJ 1087 (Ker).

70. ***Shankar Dattatraya Vaze*** v. ***Dattatray Sadasbiv Tendulkar,*** (1930) 31 Cri LJ 1000, 1001: AIR 1929 Bom 408, 409; ***Kashigar Ratangar*** v. ***State of Gujarat,*** 1975 Cri LJ 963, 964-65 (Guj).
71. For the text of Ss. 256 and 257, ***see supra,*** paras ***i~.6{b)*** and 17.4.
72. ***Haveli Ram*** v. ***MCD,*** (1966) 1 Cri LJ 162, 165: AIR 1966 Punj 82; ***Shankar Dattatraya Vaze*** v. ***Dattatray Sadashiv Tendulkar***, {1930) 31 Cri LJ 1000, 1001: AIR 1929 Bom 40S, 409; ***Kashigar Ratangar*** v. ***State of Gujarat,*** 1975 Cri LJ 963, 965 (Guj); see also, ***Executive Officer*** v. ***Devassv Joseph,*** 1972 Cri LJ 801 (Ker); ***Dudekula Lai Sahib, re,*** (1918) 19 Cri LJ 501: ILR {1917) 40 Mad 976; ***Suku Ram Koch*** v. ***Krishna Deb***
73. ***Collector of Customs v. L.R. Melwani***, 1970 ***C***ri LJ 885, 888: AIR 1970 SC 962; ***Maqbool Hussain*** v. ***State of Bombay,*** 1953 Cri LJ 1432, 1436: AIR 1953 SC 325; ***Thomas Dana*** v. ***State of Punjab,*** 1959 Cri LJ 392: AIR 1959 SC 375. Protection under S. 300 CrPC. Art. 20(2) of the Constitution would not be applicable in a case wherein conviction is set aside and direction for

try the case, could not have done so because certain conditions precedent for the exercise of the jurisdiction *{e.g.* previous sanction to prosecute) had not been fulfilled.[74] Further, in order to apply the principle of *autrefois acquit,* it is not enough that the court which acquitted the accused in the first trial had in fact the jurisdiction and competence to try the case. It Is also necessary that the court believed that it had such jurisdiction and competence. An order of acquittal passed by a court which believes (though erroneously) that it has no jurisdiction to take cognizance of the offence or to try the case, is a nullity and the subsequent trial ror the same offence is not barred by the principle of *autrefois acquit.*[7]*

In S.A. *Venkataraman* v. *Union ofIndia*[7h], the scope and meaning of the guarantee implied in Article 10(2) of the Constitution as given in *Maqbool Hussain* v. *The State of Bombay*[77] was approved by a five-judge Bench. It went on to observe that the roots of the principle are to be found in the we II-established rule of English Law which finds expression in the maxim "nemo debet bis vexari"— a man not be put twice in peril for the same offence. If a man is indicted again for the same offence In an English court, he can plead his former acquittal or conviction or, as it is technically expressed, the plea of *autrefois acquit* or *autrefois convict.* The corresponding provision in the Federal Constitution of the US is contained in the Fifth Amendment, which provides inter alia: "Nor shall any person be subjected for the same offence to be put twice in jeopardy of life and limb." This principle has been recognised and adopted by the Indian legislature and is embodied in the provisions of Section 2,6, General Clauses Act and Section 403 CrPC. It was also pointed out that the words "prosecution" and "punishment" have no fixed connotation and they are susceptible of both a wider and a narrower meaning; but in Article 20*(2)* both these words have been used with reference to an "offence" and the word "offence" has to be taken in the sense in which it is used in the General Clauses Act as meaning "an act or omission made punishable by any law for the time being in force".

To operate as a bar the second prosecution and the consequential punishment thereunder, must be for the "same offence". The crucial requirement for attracting the basic rule is that the offences are the same, *i.e.* they should be identical. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out.[78] Section 300 bars the trial for the same offence and not for different offences which may

/4. ***State*** v, ***Birdaf*** (1966) 1 Cri IJ ***166,*** 168: AIR 1966 Raj 40; see also, ***Yusofalli Mulia Noorbboy v.*** R., (1949) 50 Cri Lj 889, 892: AIR 1949 PC 264; ***Ban Nath Prasad Tripathi*** v. ***State of Bhopal,*** 1957 Cri Lj 597, 598: AIR 1957 SC 494.

75. ***hlobd. Safi*** v. ***State of*** U966) r Cri LJ 75: AIR 1966 SC 69.

76. AIR 1954 SC 375.

77. (1953) SCR 703.

78. ***State of Bombay*** v. ***S.L. Apte,*** (1961} x Cri Lj 725, 728: AIR 1-961 SC 578.

result from the commission or omission of the same set of acts.[79] Where the legislature provides that on the same facts proceedings could be taken under two different sections and the penalties provided in those sections are also different, it is obviously intended to treat the two sections as distinct* In such a case Section 300 cannot apply.[80]

(2) Even though the offence in the second trial is not "the same offence", still the second trial will be barred if it is based on the same facts for any other offence for which a different charge from the one made against him (such accused person) might have been made under Section 221(1}, or for which he might have been convicted under Section 221(2). IS. 300(1)]

Section 221 has been already discussed in para. 15.n. It may be noted that the words "for which a different charge from the one made against him might have been made" are not intended to exclude a case in which a charge in the alternative has actually been made under Section 221.[81]

(i) A. is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same fact, with theft simply, or with criminal breach of trust, (illustration *(a)* to S. 300]

{ii} A is charged before the Court of Session and convicted of the culpable homicide of *B.* A may not afterwards be tried on the same facts for the murder of *B.* | illustration (c) to S. 300]

(3) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him in the former trial under Section 220(1). [S. 300(2)]

Section 220(1) has already been discussed in para. 15.7.

Where a person has been acquitted or convicted of any offence and a separate charge for another offence could have been made but was not made against him in the former trial, he should not be liable to be again prosecuted for the other offence as a matter of course because this might lend itself to abuse.[82] To provide a check against such abuse Section 300(2) makes it obligatory to obtain the consent of the State Government before a new prosecution is launched against any person for any distinct offence

79. *M*

80. *See*, the

82. **See**, joint Committee Report, p. xxii.

for which a separate charge might have been made against him at the former trial under Section 220(1).

The provision envisages a wholesome protection to the accused person. Consent of the State Government is expected to be given only after due consideration of all the facts and circumstances of the case and with the main intendment of the law, *viz.,* promotion of justice.[83][84]

(4) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the court to have happened, at the time when he was convicted. [S. 300(3)]

Illustrations

{i) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide, [illustration (b} to S. 300] *(ii)* A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to *B. A* may not afterwards be tried for voluntarily causing grievous hurt to *B* on the same facts unless the case comes within Section 300(3) above, [illustration *(d)* to S. 300]

It may be noted that Section 300(3) above is applicable in cases where there is "a person *convicted* of any offence" and not where "a person *convicted or acquitted* of any offence... If the previous decision is one of acquittal the rule in Section 300(3) is not applicable at all.

{5) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged. [S. 300(4)]

Illustrations

(i) *A* is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. *A* may subsequently be charged with, and tried for, robbery on the same facts, [illustration *(e)* to S. 300]

{ii) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, *B* and C may afterwards be charged with, and tried for, dacoity on the same facts, [illustration (/") to S. 300].

These illustrations indicate that the former court in each illustration being incompetent, subsequent trial for an offence on the same facts is not barred by Section 300(4).^

(6) A person discharged under Section 2,58 shall not be tried again for the same offence except with the consent of the court by which he was discharged or of any other court to which the first mentioned court is subordinate. [S. 300(5)]

Section Z58 referred to above has already been discussed in para. 17.5. In a summons case instituted otherwise than upon a complaint the court has got power under Section 258 to stop the proceedings *at any stage* without pronouncing judgment. If the stoppage of proceedings is made before the recording of the evidence of principal witnesses* it shall have the effect of discharge of the accused person. However* according to Section 300(5) such accused person cannot be tried again for the same offence without the consent of the concerned court. It is believed that this provision will be helpful as a safeguard against the abuse of power of fresh prosecution in such cases.

As seen earlier the principle of *autrefois acquit* is not applicable where the previous trial had ended in an order of discharge and not of acquittal. To this rule Section 300(5) is an exception with certain limitations. The protection of *autrefois acquit* is sometimes extended by courts to cases of discharge in order to stop the harassment of the accused or to prevent the abuse of the process of law.[85]

{-} Nothing contained in Section 300 [as mentioned in the above points (1) to (6)] shall affect the provisions of Section 26* General Clauses Act* 1897 (10 of 1897), [or] of Section 188 of the Code. [S. 300(6)]

Section 188 referred to above has already been discussed in para. 9.12. The reason why that section should have overriding effect over Section 300 will also be clear from that discussion.

Section 26* General Clauses Act referred to above says:

> 26. *Provision as to offences punishable under two or more enactments*.— Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

Although the above Section 26 refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints, but rather on ingredients which constitute the two offences with which a person is charged. This is obvious from the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence". If the offences are not the same but are distinct* the ban imposed by Section 26 cannot be invoked.[86]

85.

86. *Stateof Bombay* v. 5.L. *Apte,* (1961) 1 Cri LJ 725, 730: AIR 1961 SC 578,

18.6 Principle of issue-estoppel

Strictly speaking the principle of issue-estoppel is not a plea that goes to bar a trial. The principle is a rule of evidence and its proper place would be in Chapter 22 which deals with special rules of evidence. The principle of issue-estoppel has nothing to do with Section 300, though it is conventional {and expedient also} to discuss it along with Section 300. The principle has no statutory base, or framework and it is entirely a creature of judicial decisions.

In a case decided[87, 88] by the Supreme Court in 1956, certain observations were made lending support to a statement of the Privy Council that the maxim *res judicata pro veritate accipitur*[u] is no less applicable to criminal than to civil proceedings. The decision of the case did not depend on any such rule, but those observations have been repeated in a few subsequent

cases[89, 90]

The facts and the decision in *Pritam Singh* v. *State of Punjab*[90] could be taken as a good illustration of the application of the principle of issue- estoppel. In that case the accused was charged under Section 19(f), Indian Arms Act, 1878 for possessing a revolver without a licence, and was acquitted as the prosecution could not prove that he was in possession of the revolver. In a subsequent trial of the accused on the charge of murder, it was held that the fact of possession of the revolver cannot be proved against the accused person as the prosecution was bound by the earlier decision on the point and was estopped from giving evidence to prove the contrary.

The principle of issue-estoppel, as enunciated and approved in several decisions[87, 88, 89, 90, 91] of the Supreme Court, is simply this: that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.[92]

87. *Pritam Singh*
88. Th2 maxi
89. 41st Report, p. 255,
90. 1956 Cri LJ 805: AIR
91. *Ibid.* *Mani pur Admn* . v.
92. *Masn*

While discussing the principle of issue-estoppel, quite often the Supreme Court has referred to and relied on the famous observations of Lord MacDermott in the Privy Council decision in *Sambasivam* v. *Public Prosecutor,*[93] Lord MacDermott said:

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.[94] It should be remembered that in order to invoke the rule of issue-estoppel not only the parties in the two trials must be the same but also the fact in issue proved or not in the earlier trial must be identical with what is sought to he re-agitated in the subsequent trial.[95]

Since estoppel is available to both parties in civil law, there is the question whether it should be made available to the prosecution in criminal law. No one so far has advocated that it should. But is it necessary in the interests of justice to give the defence unreciprocated advantage? The defence rightly enjoys the privilege of not having to prove anything; it has only to raise a reasonable doubt. Is it also to have the right to say that a fact which it has raised a reasonable doubt about is to be treated as conclusively established in its favour?[96]

The rule of issue-estoppel has not been incorporated in the Code as it was thought to be not quite advisable to do so at present. According to the Law Commission, our Supreme Court and our High Courts have not had proper opportunity yet of considering all the implications of the rule, and any hasty legislation may by its rigidity create difficulties.[97]

Application of "res judicata" in relation to the stages of the same litigation

The principle of *res judicata* also applies between two stages in the same litigation to this extent that a court, whether the trial court or a higher court, having at an earlier stage decided a matter in one way will not allow' the parties to re-agitate the matter again at a subsequent stage of the same proceedings.[98] Here the question is not one of "issue-estoppel"

18.7

245: (2.013) 5 SCC (eh) 891: 2.013 Cri Lj IT.2.3.

93. 195° AC 45S (PC).
94. *Ibid.* 479.
95. *Raibrider Singh* v. *State of Haryana.* (1975) 3 SCC 742: 1975 SCC (Cri) 102. 210: 1975 Cn Lj 7(77 77J; *Na:esh Non id* v. *State.* 1977
96. 41st Report. p. 256, para. 30.6. The question was taken note of by the Supreme Court in *Manipur Adn-ni.* v. *Tbokchom Sir a Singh,* (i 965} r Cri Lj 12c, 1 26: AIR T 965 SC 87. But as it was not necessary to decide it in that case the court preferred to
97. 41st Report , p. 256, para. 30,6.
98. *Saiyadhyan Ghosal* v. *Deorajin Debi,* AIR T960 SC 941, 943-44; see also, *Krishna Prasad* v. *Paras Nath,* 1978 Cri Lj 1424, 1428

as there are no separate trials but only separate stages of the same proceeding; nor can it be one of *autrefois acquit* or *autrefois convict*. How far a finding of fact finally determined at an earlier stage of the case is binding and conclusive would depend upon the question as to what the allegations were, what facts were required to be proved and what findings were arrived at." [99]

99. *Amrit'lal Ratiial Mehta v. State of Gujarat*, {1980} *1* SCC 121: 1980 SCC (Cri)

Chapter 19

Trial Procedures: Trial Before a Court of Session

Scope of the chapter and some threshold observations

19.1 As suggested by the title, the chapter mainly deals with the procedure to be followed by a Court of Session in cases coming before it for trial

A Court of Session cannot directly take cognizance of any offence exclusively triable by such court according to the First Schedule. A competent Magistrate may take cognizance of such an offence and commit the case to the Court of Session for trial[1,2] Even in respect of other offences a Magistrate may commit a case to the Court of Session under the circumstances mentioned in Sections 32.2. to 324^ All such cases shall be tried by the Court of Session according to the procedure laid down in Sections 226 to 236. These sections have been discussed in the succeeding paragraphs.

According to Section 26, the High Court has got the power to try any offence. But in practice, the High Court does not conduct any trial, nor does the First Schedule indicate any offence as being triable by a High Court. However, on rare occasions the High Court, after considering the importance and widespread ramifications of a case, may decide to try the case itself either at the instance of the government or on its own initiative. The procedure to be observed by the High Court in such a trial shall, according to Section 474,[3] be the same as would be followed by a Court

1. *See supra,* S. 2.09, para. 11.8.
2. *See supra,* para. 17.3(a).
3. S. 474 provides: "When an offence is tried by the High Court otherwise t

of Session trying such a case. Thus, the trial procedure described in this chapter shall also be applicable to trials before the High Court.

Generally speaking, a Court of Session is not to take direct cognizance of any offence. However, in respect of an offence of defamation of a high dignitary or a public official, a Court of Session can take cognizance of such an offence under the circumstances mentioned in Section 199(a).[45] After taking cognizance of such case, the Court of Session shall try it according to the special procedure prescribed by Section 13 7. The present chapter discusses this procedure also.

In respect of a trial before a Court of Session certain requirements are noteworthy:

(1) As has been provided by Section 225, "in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor". Public Prosecutor means any person appointed under Section 2.4 and includes any person acting under the directions of a public servant.[a] Section 2x5 is essentially directory in nature; and if the prosecution is in the hands of the Public Prosecutor, it does not matter that a lawyer privately engaged had acted for the prosecution.[6]

(2.) Section 303 confers an important right on the accused person to be defended by a counsel of his choice; and in a trial before a Court of Session, where the accused is not represented by a pleader, and where it appears ro the court that the accused has not sufficient means to engage a pleader, Section 304 requires that the court shall assign a pleader for his defence at the expense of the State.[7] Moreover, it has been recognised as the fundamental constitutional right of every indigent accused person to get free-legal aid for his defence.[8] Therefore, if legal aid is ro be given to the indigent accused in compliance with the constitutional requirement, and also as required by Section 304, the court must, before the commencement of the trial, make *timely* arrangements for selecting and assigning a competent lawyer for the defence, and give him adequate time and facilities for the preparation of the defence.

(3) Sections 207 and 20S[9] require the Magistrate taking cognizance of the offence to supply ro the accused copies of certain documents like police report, FIR, statements recorded by police or Magistrate during investigation, etc. A question whether the accused should be given the gists of interrogation if they are treated as statements under Section 161(3), Criminal Procedure Code came to be clarified by the Supreme Court [45678][9]

4. For the contents
5. *See supra,* d. (wj,
6. *Medichetty*
7. For detailed
8. *Hussainara Khataou (4}* v. *State of Bihar,*
9. For tli e rexr of

in *State (NCT of Delhi)* v. *Ravi Kant Sharma*[10] * to the effect that statements under Section 161 need to be separated from observations or summary of interrogations which are recorded under Section 172. in order to make available the statement under Section 161(3^ the accused. In other words, the court reiterated its views expressed in *ShamshuiKanwar* v. *State ofU.PO* that the accused is not to be given the observations of investigating officers.[12] [13] [14] [15] [16] In a trial in a warrant case, Section 238 requires the Magistrate conducting the trial to satisfy himself at the commencement of the trial that he has complied with the provisions regarding supply of copies to the accused person. Though a trial before a Court of Session relates to an offence which is relatively more serious, a provision similar to Section 238 has not been made applicable to such a trial. However, it is submitted that the Court of Session would and should, at the commencement of trial, satisfy itself that copies of documents have been furnished to the accused as required by Sections 207 and 208. In this connection it is pertinent to mention that it has been ruled by the Delhi High Court that an accused person would have the right, albeit a non-statutory right, to complete disclosure of material at the threshold of a trial, even in cases instituted otherwise than on a police report if the proceedings were preceded by police investigation.[13] [14] [15] [16] The Supreme Court in *V.K. Sasikala* v. *State*™ reiterated the view that if the accused has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy himself/herself in this regard. In case the copies were not supplied to the accused, the court would make expeditious arrangements for the supply of the copies so that the accused gets adequate and fair opportunity to prepare for his defence which is part of his right under Article 21 of the Constitution.[1']

Initial steps in the trial

19.2

(1) *Opening case for prosecution*.—When the accused appears or is brought before the court in. pursuance of a commitment of the case under Section zoyy[6] the prosecutor shall open his case by describing

10. (2007) 2 SCC 764: (2007) 1 SCC (Cr.i) 64°: 2007 Cri IJ 1674.
1(1995) 4 SCC 490: 199s SCO (Cri) 753'
12. Suite j'NCT *of Delhi}* v. *Ravi Kant Sharma*, (2007) 2 SCC 764: (2007) 1 SCC (Cri) 640: 2007 Cri *L)* 1674, *See*, di scussion or *Shamshu l Kantvar* v. *State of if.?.*, (1995) 4 SCC 450' 1:99s SCCi (Cri) 75s; *Sunita Devi* v. *State of Bihar*, (2005) 1. SCC 60R;
13. *Vinryoga international* V. *State*. 1985 Cn Lj 761: (Del).
14. iioti) 9 SCC 77 *JO* (2014} r SCC (Cri) IOTO: 2013 Cri Lj 177.
15. *Ibid*.
16. For the text of S. 209. *see supra*, para, 1T, 8.

the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. [S. 2.2.6] In other words, the Public Prosecutor should give a brief summary of the evidence and the particulars of the witnesses by which he proposes to prove the case against the accused person. It is the duty of the trial court to secure the attendance of the accused. It cannot acquit the accused on the ground that the prosecution failed to bring the accused.[17] It is not necessary for a Public Prosecutor in opening the case for the prosecution to give full details regarding the evidence including the documents by which he intends to prove his case.[18]

(2) *Discharge.*—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing. [S. 227]

This is a beneficent provision to save the accused from prolonged harassment which is a necessary concomitant of a protracted trial.[19]

The words "not sufficient ground for proceeding against the accused" clearly show that the judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution.[20]

The object in requiring the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused.[21] Besides, this requirement may help the court to keep in view the interests of the victim who does not participate at this stage. Also, It may inform the prosecution as to what went wrong with the investigation.[22]

The sufficiency of grounds would take within its fold the nature of the evidence recorded by the police or the documents produced before

17. *State of Gujarat* v.
IS. -R.W.
Harco
s v.
19.

Kewa
20. *Union of India* v. *Prafidla Kumar Samal,* (1979) 3 SCC 4: 1979
21. *State of*
Karnat
22. *R.S. Mishra* v.

the court which ex facie discloses that there are suspicious circumstances against the accused so as to frame a charge against him.[23]

For the purpose of determining whether there is sufficient ground for proceeding against an accused, the court possesses a comparatively wider discretion.[24] Whereas a strong suspicion may not take the place of proof at the trial stage, yet it may be sufficient for the satisfaction of the court in order to frame a charge against the accused.[25]

According to the Supreme Court,[26] the following four principles are applicable in regard to the exercise of the power of discharging the accused under Section 227:

1. That the judge while considering the question of framing the charges has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
2. Where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.
3. The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large, however, if two views are equally possible and the judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
4. That in exercising his jurisdiction under Section 227 the judge who under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, does not mean that the judge should make a roving inquiry into the pros and

23. *Union of*
24. *State of Ka*
25. *Uni*
26.

cons of the matter and weigh the evidence as if he was conducting a trial.

(3) *Framing of charge.*—If, after such consideration and hearing as aforesaid, the judge is of opinion that there is ground for presuming that the accused has committed an offence which

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other judicial Magistrate of the First Class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the First Class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report."[27]

{b) is exclusively triable by the court, he shall frame in writing a charge against the accused. [S. 228(1)]

It has been held that once the case is committed to the Court of Session, it becomes clothed with the jurisdiction to try it and the mere fact that the offence disclosed was not one exclusively triable by the Court of Session does not divest it of that jurisdiction.[28] A question arose whether under Section 228 an Assistant Sessions judge could transfer a case to an Additional Sessions Judge who has been designated as Chief judicial Magistrate. The Andhra Pradesh High Court said that such a transfer would he valid even though the Additional Sessions Judge was senior to the Assistant Sessions judge.[27 28 29] It has also been held that a case which was pending before an Additional Sessions judge could be transferred to the Chief judicial Magistrate if the former had not taken cognizance of the case.[30]

The purpose of Sections 227 and 228(1) of the Code is to ensure that the court should be satisfied that the accusation made against the accused person is not frivolous and thar there is some material for proceeding against him. The stage prior to the framing of a charge is not expected to be a dress rehearsal of a trial, or in other words, the details of all materials which the prosecution will produce or rely on during the stage of the trial are not expected to be produced or referred to before the judge at the time of the opening of prosecution.[31] Nor is it obligatory on the part of the court to give reasons for its framing charges.[32 27 28 29 30 31 32]

27. *Ins.* by the Code of
28. *Sammun* v. *State* of
29. *Yelugula Siva*
30. *State* v. Y.V.
31. R.W1 *Plarcos* v.
32. *See,* observations

It has been held in *Rukmini Narvekar* v. *Vijaya Satardekar*[33] that ordinarily, there is no scope for the accused to produce any evidence in support of the submissions made on his behalf at the stage of framing of charge and only such material as indicated in Section 227 CrPC can be taken into consideration by the court at the time of framing the charge. In some very rare cases, the court would be justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version was totally absurd, preposterous or concocted.

Sections 227 and 228 are interrelated and should be read together. The general principles discussed above in regard to the discharge of the accused person under Section 227 are quite relevant and applicable while considering the provision in Section 228(1) relating to the framing of charge against the accused.

While considering the question of framing a charge under the above provision, the court has the undoubted power to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. In exercising this power the court cannot act merely as a post office or a mouthpiece of the prosecution. The accused has an active role at this stage.[34] The test to determine a prima facie case against the accused would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application.[35] The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly' to be applied at the stage of Section 227 or Section 228. At this stage, even a very strong suspicion founded upon materials on record which leads the court to form, a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged may justify the framing of charge against the accused in respect of the commission of the offence.[36]

33. (zo cS)
34. *Pi tarnbar Buban* v. *State of Orissa*, 1992 Cri Lj 645 (Ori).
35.
36. *Supt. & Remembrancer*

Once a person has been charge-sheeted, there is no question of dropping any charge. He has either to be acquitted or convicted.[37 38 39]

(4) *Explaining the charge to the accused*.—Where the offence is exclusively triable by the Court of Session and a charge has been framed in writing against the accused as mentioned above in Section 128(1), the charge shall be read and explained to the accused. The accused shall then be asked whether he pleads guilty of the offence or claims to be tried. [S. 228(2)]

The section requires that the charge should not only be read out but should also be explained to the accused in clear and unambiguous terms. If necessary, the judge may even interrogate the accused in order to ascertain whether he fully understands the responsibility which he assumes by making a plea of guilty.[38 39] The default in reading out or explaining the charge to the accused would not, however, vitiate the trial unless it can be shown that the non-compliance with Section 228(2) has resulted in causing prejudice to the accused.[3]

(5) *Conviction on plea of guilty*,—If the accused pleads guilty, the judge shall record the plea and may, in his discretion, convict him thereon. [S. 229]

If the accused wants to plead guilty he should do so personally and not through his pleader. But where the personal attendance of the accused has been dispensed with and he is allowed to appear by his pleader, the accused may plead guilty through his pleader.[40] The plea of guilty must be in unambiguous terms; otherwise such a plea is considered as equivalent to a plea of not guilty.[41] Where the statements purported to be the plea of guilt were not fully, fairly and adequately recorded by the Magistrate, the conviction based on the alleged plea of guilt was set aside and the case was sent back for retrial.[42] The court has got discretion to accept the plea of guilty and to convict the accused thereon. However, this discretion is to be used with care and circumspection and on sound judicial principles bearing in mind the ultimate objective to do justice to the accused.[43] It has been clarified by the Supreme Court that if an accused who has not been

37. *Kisan Sena Sahak*
38. *Kesho Singh* v.
39. *Bamu ari* v.
40. *Kanchan Bai* v.
41. *Queen*
42. *Wazamao* v.
43. *Karam Singh v.*

confronted with the substance of allegations against him, pleads guilty to the violation of a provision of law, that plea is not a valid plea at all[44] The need for observing safeguards before pleading guilty was stressed by the Bombay High Court.[45] Usually in cases of offences punishable with death or imprisonment for life the court would be rather reluctant to convict the accused on the basis of the plea of guilty.[46] If the accused is convicted on the basis of his plea of guilty, his right of appeal is substantially curtailed by Section 375. Therefore, the question whether the words used by the accused amount in law to a plea of guilty becomes important. It is desirable, therefore, to record the exact words of the accused. The accused person might have admitted all the acts alleged against him and yet, the acts alone being not adequate to constitute the offence under the penal section, the accused cannot be held to have pleaded guilty of the offence under that particular section.[47]

If the accused is convicted on his plea of guilty, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.[48] [49] [50] This is the procedure to be followed after the order of conviction in every case, and has been discussed later in this chapter.[49] [50]

In case where a previous conviction is charged under Section 211(7) and the accused does not admit that he has been previously convicted as alleged in the charge, the judge shall follow the procedure laid down in Section 23b which has been discussed later in this chapter/[o]

(6) *Date for prosecution evidence*.—If the accused refuses to plead or does not plead, or claims to be tried or is not convicted under Section 229, the judge shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing. [S. 230]

Evidence for prosecution

19.3

(a) *Examination of witnesses*.—On the date so fixed *{i.e.* mentioned in S. 230 above), the judge shall proceed to take all such evidence as may be produced in support of the prosecution. [S, 231(1)]

44. *Pawan Kumar* v. *State of Haryana,* {1996) 4 SCC 17: 1996 SCC (Cri)
45. *Anand Vitboba Lohkare* v. *State of Maharashtra,* 1999 Cri Lj 2.857
46. *Hasaruddin Mobommad* v. *Emperor,* (19Z9) 30 Cri Lj 508, 509: AIR 1928 Cal 775; *Laxmya*
47. *A.}. Anand (Maj.)* v. *State,* 1960
48. S. 360 and
49. *See infra,* para. 19.7(6).
50. *See infra,* para. 19.7(c).

Evidence as defined in Section 3, Evidence Act, 1872 means and includes:

{/) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(//'} all documents produced for inspection of the court; such documents are called documentary evidence.

Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) reexamined [S. 138, Evidence Act, 1872]. For the meaning and scope of the examination-in-chief, cross-examination, and re-examination of witnesses, Chapter X [Ss. 135-166], Evidence Act, 1872 might be consulted.

The judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination. [S. 231(2)] It is no doubt the duty of the prosecution to examine all material witnesses essential to the unfolding of the narrative on which the prosecution is based, whether in the result the effect of that testimony is for or against the case for the prosecution.[51] It has been reiterated that the words "to take all such evidence" do not convey production of witnesses by the prosecution only up to those persons whose statements have been recorded under Section 161.[52] Apart from that, it cannot be laid down as a rule that if large number of persons are present at the time of the occurrence, the prosecution is bound to call and examine each and every one of these persons. The answer to the question as to what is the effect of the non-examination of a particular witness would depend upon the facts and circumstances of each case. In case enough number of witnesses have been examined with regard to the actual occurrence and their evidence is reliable and sufficient to base the conviction of the accused thereon, the prosecution may well decide to refrain from examining the other witnesses. However, this decision will have to be reasonable.[53] Likewise, if any of the witnesses is won over by the accused party and as such is not likely to state the truth, the prosecution would have a valid ground for not examining him in court. The prosecution, would not, however, be justified in not examining a witness on the ground that his evidence even

51. *Habaeb Mohammad* v. *State of Hyderabad,* 1954 Cri Lj 338: AIR 1954 SC 51,

52. *Ram Achal* v. 4.3. *orate or C-JU*

though not untrue would go in favour of the accused. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on the record so that there may be no miscarriage of justice. The discharge of such a duty cannot be affected by the consideration that some of the facts if brought on record would be favourable to the accused. This position enables the court to summon a prosecution witness who might give evidence in favour of the accused.[54 55] And it is the duty of the prosecution to cull out information from him by way of cross-examination.[A] In case the court finds that the prosecution had not examined witnesses for reasons not tenable or proper, the court would be justified in drawing an inference adverse to the prosecution.[54 55 56] However, the Supreme Court, in a case where the prosecutor knew at the stage of leading prosecution evidence that certain persons cited by the investigating agency as witnesses might not support the prosecution case, has held that he is at liberty to state before the court that fact.[57] Alternatively, the court can wait further and obtain direct information about the version which any particular witness might speak in court. If that version is not in support of the prosecution case, it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for prosecution.[58]

(b) *Record of the evidence.*—(i) The evidence of each witness shall, as his examination proceeds, be taken down in writing either by the judge himself or by his dictation in open court or, under his direction and superintendence, by an officer of the court appointed by him in this behalf. [S. 276(1)]

(2} Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding judge may, in his discretion, take down, or cause to be taken down any part of such evidence in the form of question and answer. [S. 276(2)]

(3) As the evidence of each witness is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. [S. 278(1)] The

54. *Aviar Singh Shashi* v. *Har Pat Singk,* 1395 Cri Lj 11.51
55. ***State of Rajasthan*** v. **Bhe**,'5.997 Cri Lj 1237 (Rsj).
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57. ***Bant*** - v. ***Stale of Mi. P.,*** (2004) r SCC 414: 2004 SCC
.58. *Ibid.*

burden of proving non-compliance of Section 278 is on the complainant.[59] If the witness denies the correctness of any part of the evidence when the same is read over to him, the judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary. [S. aySja)][60] If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands. [S. 278(3)]

(4) The evidence so taken down shall be signed by the judge and shall form part of the record. [S. 276(3)]

(5} When a judge has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination. [S. 280] The section aims at giving some aid to the appellate court in estimating the value of the evidence recorded by the trial court.

(6} If the witness gives the evidence in the language of the court, it shall be taken down in that language; [S. 277(d)] if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the court shall be prepared as the examination of the witness proceeds, signed by the judge, and shall form part of the record. [S. 277^?)] Where the evidence is taken down in a language other than the language of the court, a true translation thereof in the language of the court shall be prepared as soon as practicable, signed by the judge, and shall form part of the record; but in such a case when the evidence is taken down in English and a translation thereof in the language of the court is not required by any of the parties, the court may dispense with such translation. [S. 277(c)]

(7) Whenever any evidence is given in a language not understood by the accused (or his lawyer), it shall be interpreted to him (or to his lawyer) in a language understood by him. [S. 279] This has already been discussed in para. 13.8.

19.4 Steps to follow the prosecution evidence

(i) *Oral arguments and memorandum of arguments on behalf of the prosecution*,—Section 314 enables the prosecutor to submit his arguments after the conclusion of the prosecution evidence and before any other step in the proceedings, including the personal examination of the accused under Section 313(1)*), is taken. The prosecution arguments at this stage might help the court in conducting the examination of the

59. *Mangi Lai* v. *State*, 1989 Cri
60. *Mir Mohd. Omar* v. *State of W.B.*, (1989)

accused and seeking his explanations on the points raised by the prosecution. Section 314 has already been discussed in para. 16.13.

(2) *Explanation of the accused*.—After the witnesses for the prosecution have been examined and before the accused is called on for his defence, Section 313(1 *}{b)* requires the court to question the accused person generally on the case for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him. Section 313 has already been discussed at length in para. 16.9.

(3) *Hearing the parties*.—Section 232 empowers the court to acquit the accused if there is no evidence that the accused committed the offence. This the court can do before calling upon the accused to enter upon his defence and to adduce evidence in support thereof. With a view to help the court in taking the decision in this matter, Section 232 gives an opportunity to both the prosecution and the defence to address the court on the point. The comments of the parties would naturally relate to the evidence adduced by the prosecution and the personal examination of the accused.

(4) *Order of acquittal*.—If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the judge considers that there is no evidence that the accused committed the offence, the judge shall record the order of acquittal. [S. 232]

The object of Section 232 is to expedite the conclusion of the sessions trial and, at the same time, to avoid unnecessary harassment to the accused by calling upon him to adduce evidence or to avoid the waste of public time when there is no evidence at all.[61]

The section confers an important statutory right upon the accused person to take his chance of acquittal up to the stage of Section 232. Till then, he is under no duty to disclose the names of his defence witnesses. If the judge does not think it proper to acquit him under Section 232, he has to call on the accused to enter on his defence and it is that stage at which the accused person is under duty to apply for the issue of process for summoning the defence witnesses.[62]

The words "no evidence" in Section 232 should not be taken as meaning "no satisfactory, trustworthy or conclusive evidence". The words simply import the sense that there is upon the record only such evidence which, even if it were perfectly true, would not amount to legal proof of the offence charged against the accused.[63] What the court has to decide

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62. *Prem* v. *State of Haryana*, 1975 Cri Lj 142.0, 1422 {P&H).

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under Section 232 is whether there is evidence to show that the accused has committed the offence; but at that stage the court should not consider what value should be attached to such evidence. If the court finds that there is "no evidence" within the meaning of what is narrated above, then it has power to acquit the accused.[64 65] The court passing such an order of acquittal may have to give some reasons as to why it came to the conclusion that there was no evidence at ail as its order of acquittal would be ordinarily subject to appeal.

19.5 Evidence for the defence

(a) Examination of witnesses for the defence.—Where the accused is not acquitted under Section 232 as mentioned above, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof. [S. 233(1)]

This salutary provision is mandatory in nature and is intended to protect the interests of the accused person. It casts a duty on the trial court to call upon the accused person to enter on his defence and adduce evidence, he may have in support thereof.[64 65 66]

If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the judge shall issue such process unless he considers, for reasons to be recorded, that any such application should be refused on the ground that it is made for the purpose of vexation or for delaying the ends of justice. [S. 233(3)] However, the court cannot, after ordering recalling of witnesses at the instance of the accused, disallow confrontation or witnesses by the accused.[67]

The accused himself is a competent witness and can give evidence on oath in disproof of the charges made against him. This has been provided by Section 315 which has already been discussed in detail in para. 16.11.

(b) 'Written statement of the accused.—The accused person, if he so desires, can put in any written statement in his defence. If he puts in any such statement, the judge shall file it with the record. [S. 233(2)]

(c) If the accused applies for compelling the attendance of any witness or production of any document, the judge shall do so unless he considers that the request should be declined for reasons to be recorded. If the judge feels that the application has been made for vexation or for causing delay, he should refuse to act. [S. 233 (3)][68]

64. ***Kumar*** v. ***State of Karnataka,*** 1976 Cri LJ 925, 927 (Kant); see also, ***Pati Ram*** v. ***State of***

65. *Hanif Banomiya Sbikalkar* v. *State*

66. *Parameswara Kurup Janardhanan*

67. *T.N. janardhanan Pillai* v. *State of*

68. See, ***State of M.P.*** v. ***Badri Yadav***,

(d) Record of the evidence.—The witnesses for the defence shall be examined in the same manner as has been mentioned in case of prosecution witnesses in para. *19.3(a)* above. Similarly, the rules for recording the evidence as discussed in para. 19.3(b) would equally apply in recording the evidence for the defence.

Steps to follow the defence evidence

19.6

(i) *Court witnesses, if any.*—As provided by Section 311 the court can, *at any stage,* summon and examine any person as a court witness if his evidence appears to be essential to the just decision of the case. This has already been discussed in para. *16.6.*

{2} *Arguments.*—When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply.

Provided that where any point of law is raised by the accused or his pleader, the prosecution may with the permission of the judge, make his submission with regard to such point of law. [S. 234]

It may be recalled that Section 314 also provides for the arguments of the parties.[69] According to that section any party may, *as soon as may be,* after the close of his evidence submit arguments in support of his case. Accordingly after the conclusion of the evidence for the defence, it is for the defence to address the arguments. However, Section 234 directs that after the evidence for the defence is concluded it is for the prosecution to sum up the case, and then the defence is entitled to reply. The apparent inconsistency between Section 314 and Section 234 may not, however, create much difficulty in actual practice. Section 314 is a general section, while Section 234 is a special one regarding arguments. Therefore, Section 234 would get precedence over Section 314.

Judgment and connected matters

{a) Judgment.—After hearing arguments and points of law (if any), the judge shall give a judgment in the case. [S. 235(1)]

19.7

Provisions regarding the delivery and pronouncement of the judgment, its language and content, various directions regarding the sentence and other post-conviction orders that might be passed, compensation and costs to aggrieved party etc., are all contained in Sections 353 to 365 and would be discussed later in Chapter 23.

(b) *Procedure to follow the order of conviction.*—If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law. [S. 235(2)] If the judge convicts

69. *See supra,* para. 16.15.

the accused person, he is required to pass sentence on him according to law. However, considering the character of the offender, the nature of the offence and the circumstances of the case, the judge may, instead of passing the sentence, decide to release the offender on probation of good conduct under Section 360, or under the Probation of Offenders Act, 1958. Section 361, as will be seen later in Chapter 23, ordains that the offenders should, as far as possible, be released under the probation or other like laws.

After the accused is found guilty and an order of conviction is recorded by the court, a separate and specific stage of trial has been provided by Section 2.35(2.) whereby the court is required to hear the accused (to be more precise, the convicted person) on the question of sentence. In this sense, the section provides for a bifurcated trial and specifically gives to the accused person a right of pre-sentence hearing which may not be strictly relevant to or connected with the particular crime under inquiry but may have a bearing on the choice of the sentence.[70]

The object of this provision is to acquaint the court with the social and personal data of the offender and thereby to enable the court to decide as to the proper sentence or the method of dealing with the offender after his conviction. It has been said that this provision has been made because it may happen that the accused may have some grounds to urge for giving him consideration in regard to the sentence such as that he is the breadwinner of the family of which the court may not be made aware during the trial.[71]

The section does not throw any light on the meaning and scope of the term "hearing" in relation to the question of sentence. However, it has been held that the hearing contemplated by Section *2.35(2)* is not confined merely to hearing oral submissions, but is also intended to give an opportunity to the prosecution and the accused to place before the court facts and materials relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, the court would take care to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings.[72] The Supreme Court has further held that the obligation to hear the accused on the question of sentence is not discharged by putting a formal question to him as to what he has to say on the question of sentence. The court must make a genuine effort to elicit from the accused all information which

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will eventually bear on the question of sentence. It is the bounden duty of the court to cast aside the formalities of the court scene and approach the question of sentence from broad sociological point of view. Therefore the questions which the judge can put to the accused under Section 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act.[73] In complying with the requirements of Section 235(2), what is more important is the spirit and substance of that provision, and not just its letter and form.

As a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. A sentencing decision taken without following the requirements of Section 235(2) in letter and spirit is likely to be struck down as violative of the rules of natural justice.[74][75]

Non-compliance with the requirement of Section 235(2) cannot be described as a mere irregularity in the course of the trial and as such curable under Section 465. It is much more serious and would vitiate the order of sentence. Moreover, when no opportunity has been given to the accused to produce material and make submissions in regard to the sentence to be imposed on him, failure of justice is implicit and therefore, the defect of non-compliance with Section 235(2) is not curable by Section 465."

Where it is found by the appellate or revisional court that the trial court has not complied with the requirement of Section 235(2), it need not necessarily remand the case to the trial court in order to afford an opportunity to the accused to have his say on the question of sentence. In a case where only the minimum sentence prescribed for the offence has been awarded by the trial court but without complying with the requirement of Section 235(2), remanding the case to the trial court is unnecessary for all practical purposes.[76] Even in other cases remand may not always be necessary, and the higher court may itself hear the accused on the question of sentence and may give necessary facilities to the accused for this purpose.[77]

73. *Muniappan* v. *State ofT.N.*, (1981} 3 SCC 11: 1981 SCC (Cri) 617, 619-2.0: 1981 C-ri LJ 726,727

74. See, discussions in *AUauddin Mian* v. *State of Bihar*, (1989) 3 SCC 5: 1989 SCC (Cri.) 490: 1989 Cri Lj 1466; see, *Suryamoorthi* v. *Govindaswamy*, {1989} 3 SCC 24: 1989 SCC (Cri) 472:

75. *Santa* S *ingh* v. *State ofPunjab*, (1976) 4 S CC 190:1976 SCC

/6. *Tarlok Singh* v. *State of Punjab*, (1977) 3 SCC 2x8: T9 77 SCC (Cri) 490: X977 Cri Lj 1139; *Nirpal Singh* v. *State of*

77. *Dagdu* v. *State of Maharashtra*, (1977) 3 SCC 68: 1977 SCC (Cri) 421, 442: 1977 Cri Lj

According to the wording of Section 235(2), the accused is to be heard only if the court does not want to proceed in accordance with the provisions of Section 3So. It is submitted that even the decision or releasing the offender under Section 360 or under the Probation of Offenders Act should be taken only after hearing the accused. That would enable the court to deal with the convicted person more appropriately.

(c) *Procedure in case of previous conviction*.—In a case where a previous conviction is charged under the provisions of Section 211(7),^ and the accused does not admit that he has been previously convicted as alleged in the charge, the judge may, after he has convicted the said accused under Section zzy[79] or Section 235[80], take evidence in respect of the alleged previous conviction and shall record a finding thereon:

Provided that no such charge shall be read out by the judge nor shall the accused be asked to plead guilty thereto not shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under Section 229 or Section 235. [S, 236]

The section provides for a special procedure for determining liability to enhanced punishment as a consequence of previous conviction. The object of the section in prohibiting the proof of previous conviction to be given until and unless the accused is convicted, is to prevent the accused from being prejudiced at the trial.[81]

19.8 Procedure in cases of defamation of high dignitaries and public servants

Section 237 provides for a special trial procedure to be followed by a Court of Session taking cognizance of an offence under Section 199(2).^ The primary object behind Section 199(2) and the remaining sub-sections (3), (4) and (5) of Section 199 is to provide a machinery enabling the government to step in to maintain confidence in the purity of administration when high dignitaries and other public servants are wrongly defamed. Section 237 which provides special trial-procedure in such cases is as follows:

Procedure in cases instituted under Section 199(2}

237. (.1) A Court of Session taking cognizance of an offence under sub-section (2) of Section 199 shall try the case in accordance with the procedure for the trial of warrant cases instituted otherwise than on a police report before a Court of Magistrate:

12.06; see also, ***Saddruddin Khushai*** v. ***CCE & Customs,*** 1979 Cri Lj 1265 (Goa JCC).

78. ***See supra,*** para. 15.2(7).
79. ***See supra,*** para. 19.2(5).
80. *See supra,* para. *19.7(a)* and *(b).*
81. ***See,*** observations in ***Kamya, re,*** 1960 Cri IJ 1502: AIR 1960 AP 490.
82. ***See supra,*** para. IO.5(II)(£?}.

Provided that the person against whom the *offence is* alleged to have been committed shall, unless the Court of Session, for reasons to be recorded, otherwise directs, be examined as a witness for the prosecution.

(2) Every trial under this section shall be held *in camera* if either party thereto so desires or if the Court thinks fit so to do.

(3) If, In any such case, the Court discharges or acquits all or any of the accused and is of opinion that there was no reasonable cause for making the accusation against them or any of them, it may, by its order of discharge or acquittal, direct the person against whom the offence was alleged to have been committed (other than the President, Vice-President or the Governor of a State or the Administrator of a Union territory) to show cause why he should not pay compensation to such accused or to each or any of such accused, when there are more than one.

(4) The Court shall record and consider any cause which may be shown by the person so directed, and if it is satisfied that there was no reasonable cause for making the accusation, it may, for reasons to be recorded, make an order that compensation to such amount not exceeding one thousand rupees, as it may determine, be paid by such person to the accused or to each or any of them.

(5) Compensation awarded under sub-section (4) shall be recovered as if it were a fine imposed by a Magistrate.

(6) No person who has been directed to pay compensation under suh-sec- tion (4) shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made under this section:

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(7) The person who has been ordered under sub-section (4) to pay compensation may appeal from the order, insofar as it relates to the payment of compensation, to the High Court.

(8) When an order for payment of compensation to an accused person is made, the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided.

The trial in such cases, subject to the provisions of Section 237 above, shall be according to the procedure laid down in Sections 244 to 247 for the trial of warrant cases instituted otherwise than on a police report before a Court of Magistrate. These sections will be discussed later in Chapter 20.

Section 199(2) to (5} and Section 237 are intended to provide machinery for vindicating the conduct of Ministers and public servants when they are exposed to defamatory attacks. The provisions have been preeminently designed in the public interests. They authorise the State to take upon itself the power to prosecute the offenders in appropriate cases. But lest this

S3. *P.C, Joshi* v. *State ofU.P.*, (1961) 1 Cri Lj 566, 570: AIR 1961 SC 387.

Chapter 20

Trial Procedures: Trial of Warrant Cases by Magistrates

Scope of the chapter 20

A warrant case is a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years.[1][2] Cases tried before a Court of Session are all warrant cases except the cases of defamation tried under Section 237/ These cases being of relatively more serious type, the trial procedure prescribed is rather elaborate.[3] The rest of the warrant cases are to be tried by magistrates as shown in column 6 of the First Schedule. The trial procedure prescribed in respect of these offences is contained in Sections 23 S to 250, and is discussed in this chapter.

Sections 238 to 250 divide themselves into three groups. The first group (A) consisting of Sections 238 to 243 deals with provisions mainly applicable in respect of warrant cases instituted on a police report; the second group (B) consisting of Sections 244 to 247 dealing with provisions exclusively applicable in respect of such warrant cases as are instituted otherwise than on a police report; the third group (C) consists of Sections 248 to 250 which are equally applicable both to cases instituted on a police report and cases instituted otherwise than on a police report. The difference in procedure is understandable. In cases instituted on a police report, lot of record made during investigations by the police is made available to the court and to the accused person. Such record cannot obviously be

1. *See supra*, S. 2(JC), para.
2. *See supra*, para. 19.8.
3. *See supra*. Chap. 19.

available (as it simply does not exist) in cases instituted otherwise than on police report. Therefore it becomes necessary in such cases to provide special procedures to enable the accused to acquaint himself with the facts of the case on which the prosecution is relying before he is called upon to defend himself,

A. Cases instituted on a police report

20.2 Initial steps in the trial

(i) *Supply of copies to the accused.*—When in any warrant case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207.[4][5] [S. 238) The object of this provision is to enable the accused to have an all round picture of the case against him even at the commencement of the enquiry and in order to enable him to cross-examine the witnesses on such defence as he may set up and to avoid delayd It has been ruled that an accused person would have the right albeit a non-statutory right to complete disclosure of material at the threshold of a trial, even in cases instituted otherwise than on a police report if the proceedings were preceded by police investigation.[6][7][8][9] The section uses the word "shall", but it appears to be directory and not mandatory. Even if there is an entire omission to carry out the provisions regarding supply of copies in the beginning of the trial to the accused, it will not be fatal so as to vitiate the trial but will be merely an irregularity curable under Section *46$ J* The expression "at the commencement of the trial" means "at the beginning of the trial", which in the context of the sections means at the point when the charge is framed.[3]

{2} *Discharge of accused if allegations against him are baseless.*—If, upon considering the police report and the documents sent to it under Section 173'and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. [S. 239) [4][5][6][7][8][9]

4. For ihe text of S. 207, *see supra,* para. 11.7(a).
5. *Salig Ram v. State.* 1375 Cri LJ 1030, 1033 (HP); see also, *Palagam Veeraragbavula* v. *State,* AIR 1958 AP 301: 1958 Cri Lj 603.
6. *Viniyoga International* v. *State,* 19S5 Cri Lj 761 (Del).
7. *Salig Ram* v. *State,* 1973 Cri LJ 1030, 1033 (HP); see also, *Noor Khan* v. *State of Rajasthan,* (1964) 1 Cri Lj 167: AIR 1964 SC 286.
8. *Nageshwar Singh* v. *State of Assam,* 1974 Cri Lj 193, 194 (Gan); see also, *Abbas Beary* v. *State of Mysore,* {1965) 1 Cri Lj 187, 189: AIR 1965 Mys 35; *Dharma Reddy* v. *State,* 1972 Cri LJ 436, 438 (AP); *Kanbi Bechar Lala* v. *State,* (1962) 2 Cri Lj 759: AIR 1962 Guj 316.
9. *See supra,* para. 8.14(c).

Sometimes it may be necessary to discontinue the groundless prosecution half way and discharge the accused to avoid unwarranted trial process which will ultimately result in acquittal- Similar situation may arise in summons cases as well but there is no provision similar to Section 2,39 to cover this. However, the power to recall the summons used to be exercised on the basis of *K.M. Mathew* v. *State of Kerala*[10]. This came to be reversed in *Adalat Prasad* v. *Rooplal JindaF*[9]. This has necessitated the parties' filing petitions under Section 482 for quashment. In *Subramanium Sethuraman* v. *State of Maharashtra*[11], the Supreme Court held that recall of summons is permissible before recording the plea of the accused under Section 252. The situation calls for review.

A question arose as to whether an accused in a warrant case was entitled to place on record certain documents for being considered before framing charges. The Punjab and Haryana High Court held that at that stage the documents sought to be introduced by the accused are required to be included in a list and the prosecutor can be called upon to admit or deny the genuineness of each document. This right is not merely conferred on the accused, but a corresponding right is also vested in the prosecution.[13]

This section has to be read along with Section 240 according to which, if after considering the documents and the examination of the accused and hearing the accused, the Magistrate thinks that there is ground for presuming that the accused has committed an offence triable under Chapter XIX of the Code *{i.e.* dealing with trials of warrant cases by Magistrates) within the Magistrate's competence and for which he can punish adequately, he has to frame in writing a charge against the accused. Reading the two sections together, it clearly means that if there is no ground for presuming that the accused has committed an offence, the charges must be considered to be groundless, which is the same thing as saying that there is no ground for framing the charges. This necessarily depends on the facts and circumstances of each case and the Magistrate is entitled and indeed has a duty to consider the entire material referred to in the above Section 239.[14]

After the necessary documents as mentioned in Section 173 are supplied to the accused, he must be given a reasonable opportunity of being heard and engaging a counsel before framing the charge.

JO. {1992.) 1 SCC 217T 1992 SCC (Cri) 88.

13. (2004} 7 SCC 338: 2004 SCC (Cri} 1927.

12. (2004) 15 SCC 324: 2005 SCC (Cri) 242: 2004 Cri Lj 4609.

13. *Vinodkumar* v. *Stale of Haryana.* 1987 Cri Lj 1535 (P&H); see also, *Aiarakh* v. *State of Rajasthan.* 1986 Cri Lj 1794 (Raj).

14. *Century Sfig. and Mfg.* Co, v. *State of Maharashtra,* (1972) 3 SCC 282: 1972 SCC (Cri) 495: 1972 Cri Lj 3²9, 335-3⁶, 5°4.

The expression "opportunity of being heard" means opportunity of addressing arguments in support of their respective cases, and does not mean examination of witnesses*[15]

Before charging or discharging the accused, the court has to apply its judicial mind to all the evidence in the case. The evidence which may persuade the court to hold the charge groundless, must be clinching in nature and the court cannot give benefit of doubt to the accused at that stage and discharge him. At the same time the court is not to look into such evidence merely by way of an idle formality. At this stage even a very strong suspicion founded on materials before Magistrate which leads him to form a presumptive opinion as to existence of factual ingredients constituting the offence is sufficient.[16] The court has to consider it along with other evidence, and if after doing that it finds that there is absolutely no ground for believing that the accused has committed the offence, it is bound to discharge him.[17]

As the Magistrate has to reach the decision of discharging the accused after a proper consideration of the documents and hearing both sides and his order of discharge is subject to revision, it is obviously necessary that he should record his reasons in the order.[18] However, he need not give reasons for his decision to frame charges.[19]

The Supreme Court upheld an order refusing to discharge the accused under Section 239 on the ground of death of the complainant. It upheld order permitting the legal representatives of the deceased complainant to continue with the prosecution.[20]

(3) *Framing of charge*.—If upon such consideration of the police report and the documents sent with it under Section 173, the examination of the accused if any, and hearing the parties, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competeni to try and

15. *Mirza Mohammed Afzal Beg v. State*, 1959 Cri L] 978, 979: AIR 1959 j&K 77; *Kazi and Khatib Mohamudkhan* v. *Emperor*, *{1946)* 47 Cri Lj 2.40, 2,41: AIR 1945 Nag 12.7, 129; *Thirthraj Upendra josh;* v. *State of Karnataka*, 1983 Cri Lj 318, 320 (Kanr); but see, *State of W.B.* v.
16. *Nitaipada Das* v. *Sudarsan Sarangi*, 1991 Cri LT 3012 (Ori). See also, *Bharat Parikb* v. *CBI*, (200S) 10 SCC 109: (2008) 3 SCC (Cri) 609: 2008 Cri Lj 3540; *Yogesh v. State of Maharashtra*, (2008) 10 SCC 394: (2009) 1 SCC (Cri) 51: 2008 Cri Lj 38725 *P. Vijayan* v. *State of Kerala*, {2010) 2 SCC 398: (2010) 1 SCC (Cri) 14SS: 2010 Cri Lj 1427;
17. *Stale* v. *C.K. Gulhazi*, 1982 Cri LJ 1923, 1925-26 (j&K).
18. *See*, 41st Report, p. 171, para. 21.3; see also, *jetha Nand v. State of Haryana*, 1983 Cri Lj 305, 307 (P&H); *Munna Lai Gupta* v. *State of*
19. *Kami Bhadra Shah* v. *State of W.B.*, (2000) 1 SCC 722: 2000 SCC (Cri) 303; see also. *Mohd. Hussain* v. *State of U.P.*, 2004 Cri Lj 2694 (All); *R.S. Mishra* v. *State of Orissa*, (2011) 2 SCC 6S9: (201 x) 1 SCC
20. *Rashida Karnahtddin Syed* v. *Shaikh Saheblal Mar dan*, (2007) 3 SCC 548: (2007) 2 SCC (Cri) 63.

which in his opinion, couid be adequately punished by him, he shall frame in writing a charge against the accused. [S. 240(1)]

Section 240(1) above requires a Magistrate to consider the documents referred to in Section 173 before framing charges. The documents referred to in Section 173 consist of records of investigation which are not admissible in evidence at the trial but can be made use of for limited purpose as stated in Section 162. This material does not at the stage of framing a charge have the status of evidence tendered on oath nor has its veracity' been tested by cross-examination or contradicted by the evidence which the accused may lead in defence. It may be that at the trial, the material on the basis of which a charge has been framed may not stand the test of cross-examination or is rendered unacceptable "but these considerations become available only at the conclusion of the trial and do not enter into consideration at the stage when the Magistrate has to make up his mind as to whether or not he should frame a charge.[21]

The examination of the accused referred to in Section 240(1) can only be with reference to documents referred to in Section 173.[22] The object of examining the accused at the initial stage is to afford an opportunity to him to explain any circumstance appearing against him. However, the examination of the accused is not imperative.[23] If upon consideration of all the documents and other circumstances, the Magistrate comes to the conclusion that the accusation is without any substance then he may" discharge the accused even without examining him. Examination becomes necessary when there are facts or circumstances in the documents etc., which go against the accused and which need explanation before framing a charge.[24]

The order framing the charges does substantially" affect the person's liberty and according to the Supreme Court, it is not possible to countenance the view that the court must automatically frame the charge merely because the prosecuting authorities, by relying on the documents referred to in Section 173, consider it proper to institute the case. The responsibility of framing the charges is that of the court and it has to judicially consider the question of doing so. Without fully adverting to the material on the record it must not blindly adopt the decision of the prosecution.[25] Nor should it be influenced by the counsel for the complainant.[26]

21. *Raghavendrarao* v. *State ofA.P.*, 1.973 Cri Lj 789, 790 (AP).
22. G.D. *Chadha* v. *State of Rajasthan.* 1971 Cri Lj 15S5, 1587 (Raj).
23. See, discussions in *Rukmini Narvekar* v. *Vijaya Saiardekar*, (z00S) 14 $CC T:
24. *Thirthraj Upendra Joshi* v. *State of Karnataka*, 1983 Cri LJ 31.8,
25. *Century Spg. and Mfg. Co.* v. *State of Maharashtra*, (197 2} 3 SCC 282:1972 SCC (Cri) 495: 1972 Cri Lj 329, 355-36, 504; *Thirthraj Upendra Joshi* v. *State of Karnataka*, 1985 Cri Lj 31S, 320 (Kant); *also see*, observation in *Rangarappa* v. *G.N. Hega.de*, 1992 Cri Lj
26. *See.* discussion in *Radhey Shy am* v. *State of U.P.* 1992 Cri Lj 202

The stage at which the Magistrate is required to consider whether to discharge or to frame a charge is of vital importance both to the prosecution and the accused. In view of this Sections 239 and 240 prescribe some definite guidelines which the Magistrate must observe and comply with before arriving at his conclusion of discharging the accused or of framing a charge against him. These sections demand that the Magistrate must consider the police report and all the documents furnished by the police along with such report and if need be, to examine the accused, hear the arguments of both the sides and then arrive at his conclusion, independent of and uninfluenced by the police opinion, whether the material placed before him if accepted at its face value, w'ould furnish a reasonable basis or foundation for the accusation, In doing so, the Magistrate is of course expected to apply his judicial mind to the facts of the case keeping throughout in view the essential ingredients of the offence for which the accused is sought to be charged.[27] Once a person has been charge-sheeted, there is no question of dropping any charge. He has either to be acquitted or convicted.[28][29][30]

(4) *Explaining the charge to the accused.*—After the framing of the charge, it shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried. [S. 240(2)]

The section requires that the charge should not only be read out but should also be explained to the accused in a manner which ensures that the accused has understood it properly.[29][30] If he has been made aware of the offences, a mistake in charges while taking cognizance may not prejudice the accused.'[0] The considerations mentioned in ***supra,*** para. 19.2(4) are also applicable here.

(5) *Conviction on plea of guilty.*—If the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon. [**s.** 241]

If the facts alleged against the accused do not constitute a crime, a plea of guilty under such circumstances is only admission of facts and not an admission of guilt.[31] Here again the points discussed in ***supra,*** para. 19.2(5) may be conveniently referred to and relied on.

27. *Badamo Devi* v. *State,* 19S0 Cri Lj 1143 (HP).
28. *Kisan Seva Sahakari Sarniti Ltd.* v. *Bachan Singh,* 1993 Cri LJ 2540 {All); *State of Maharashtra* v. B.K. *Sahbarao,* 1993 Cri LJ 1984 (Bom); *Prakash Chander* v. *State,* 1995 Cri LJ 368 (Dei).
29. *jodba Singh* v. *Emperor,* AIR 1923 Aii 285, 286.
30. *Shyam Sunder Rout* v. *State of Orissa,* 1991 Cri Lj 1595 (Ori).
31. *Gannon Dunkerley & Co., re,* (1950) 51 Cri Lj 1367: AIR 1950 Mad 837, 838; *State of M.P.* v. *Mustaq Hussain,* {1965} 1 Cri Lj *jxx:* AIR 1965 MP 137. 138; *Basant Singh* v. *Emperor, (ipz6)* 27 Cri Lj 907, 908 (Lah). *Also see,* the observations of the Bombay High Court as to the need to comply with various safeguards before accepting a plea of

If the accused is convicted on his plea of guilty, the Magistrate shall, unless he proceeds in accordance with the provisions of Section 325[32] or Section 360, hear the accused on the question of sentence and then pass sentence on him according to law.[32 33]

In case where previous conviction is charged under Section 211(7) and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate shall follow the procedure as laid down in Section 248(3) which shall be discussed later in this chapter.[32 33 34]

(6) *Fixing date for examination of witnesses*.—If the accused refuses to plead or does not plead, or claims to be tried or the Magistrate does not convict the accused under Section 241 above, the Magistrate shall fix a date for the examination of witnesses. [S. 242(1)] Recording of the evidence on the very day on which the charge is framed would render the proceedings illegal. The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or thing. [S. 242(2)]

The word "may" suggests that the Magistrate has discretion in the matter of issuing summons to a prosecution witness.[35] If the prosecution had made an application for issue of summons to its witnesses either under Section 242(2) or 254(2), it is the duty of the court to issue summon to the prosecution witnesses and to secure the witnesses by exercising all the powers given to it under the code.[36]

Evidence for prosecution

20.3

(a) Examination of witnesses.—On the date so fixed for the examination of witnesses, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution:

Provided that the Magistrate may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination. [S. 242(3)] The proviso permitting the cross-examination of any witness to be deferred until any other witness or witnesses have been examined is based on sound principle. But in practice the provision might be resorted to without sufficient justification and might lead to delay, expense and inconvenience to witnesses. In order to minimise this risk of abuse or misuse of the provision, permission of the court has been made imperative.

32. For the text of S. 325, *see supra*, para. 14.3(5}.
33. S. 360 and other allied matters and the sentencing process have been discussed in Chap. 23; *see also infra.* para. 20.11(5}.
34. *See infra*, para. 20.n(/?).
35. *Easin Ali* v. *Abdul Obdud*, 1982 Cri Lj 1052, 1054 (Cal).
36. *See*, discussion in *State of U.P.* v. *Babu*, 1991 Cri Lj 99T, 993 (AH); *see also*, observations in *State of Gujarat* v. *Naresbbhai Haribhai*

It may be noted that while Section 242(2) gives a discretion to the Magistrate to issue summons to the prosecution witnesses on the application of the prosecution, Section 242(3) casts a duty on the Magistrate to take ail such evidence as may be produced by the prosecution on the date fixed.[37]

The prosecution is not required to produce all the witnesses mentioned in the first information report. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses.[38] It is the duty of the prosecution to cull out information/'evidence from the hostile witnesses by cross-examination.[39] In this connection, the points discussed in *supra,* para. 19.3 *(a)* are equally applicable and important here also.

The Magistrate is to take *all* the evidence adduced by the prosecution, and he cannot acquit the accused after taking only part of the prosecution evidence.[40] It is improper to close the prosecution evidence or to dismiss the case on the ground that the witnesses against whom process was issued did not appear on the date of hearing. Once the court issues process against the witnesses, it is the bounden duty of the court to enforce the attendance of the witnesses. If cases are dismissed because of wilful default committed by witnesses then a situation may arise where the court as well as the party will be at the complete mercy" of the witnesses. This will undoubtedly defeat the very ends of justice.[41]

(b) Record of the evidence.—(1) In all warrant cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or, by his dictation in open court or, where he is unable to do so owing to a physical or other incapacity, under his dictation and superintendence, by an officer of the court appointed by him in this behalf. [S. 275(1)]

(2) Where the Magistrate causes the evidence to be taken down, he shall record that the evidence could not be taken down by himself for the reasons referred to in sub-section (1) given above. [S. 275(2)]

(3) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer. [S. 275(3)]

37. *Easin Alt* v. *Abdul Obdud,* 19S2 Cri Lj 1052 {Cal},
38. *Raghubir Singh* v. *State of* LLP., (1972) 3 SCC 79: 1972 SCC (Cri) 399, 404: 1971 Cri LJ 1468; see also, *Banti* v. *State of M.P.,* {2004) 1 SCC 414:
39. *State of Rajasthan* v. *Bhera,* 1997 Cri Lj 1237 (Raj).
40. *State* v. *Bhimeharan,* (1962) 2 Cri Lj 85: AIR 1962 Ori 139, 140; see, *State of Gujarat* v. *Nareshbhai Haribhai Tandel,* 1997 Cri Lj 2783
41. *Kanshi Nath Pandit* v. *Omkar Nath,* 1975 Cri Lj 1090, 2091 (j&K); see also, *State of Gujarat* v. *Nag in Arnara* Vasava, .1982 Cri Lj 1880 (Guj); *State of Mysore* v. *Rarnu S.,* 1973 Cri IJ 2257 (Mys).

{4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record. [S. 275(4)]

{5) The provisions regarding the reading over of the evidence to each witness, [S. 278] the recording of the remarks respecting the demeanour of a witness, [S. 280] the language in which the evidence is to be recorded, [S. 277] the interpretation of the evidence to the accused or his pleader, [S. 279] are the same as are applicable in respect of evidence recorded in a trial before a Court of Session. These provisions have already been discussed in *supra.* para. 19.3(h).[42]

Steps to follow the prosecution evidence

After the completion of the prosecution evidence two important steps are taken: 1) Oral arguments and memorandum of arguments on behalf of the prosecution; [S. 314] 2) Examination of the accused under Section 313(1)

(h) . These matters have already been discussed in relation to trial

before a court of session in clauses (1) and (2) of para. 19.4: the same is equally applicable here, but need not be repeated all over again.

20.4

Evidence for the defence

(a) Examination of witnesses for the defence.—After the completion of the prosecution evidence, the submission of the prosecution arguments, and the examination of the accused person under Section 313(1)(h), the accused shall then be called upon to enter his defence and produce his evidence. [S. 243(1)] If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, *[i.e.* S. 243] unless the Magistrate is satisfied that it is necessary for the ends of justice. [S. 243(2)] 20.5

The Magistrate may, before summoning any witness on an application under Section 243(2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in court. [S. 243(3)] However, as mentioned earlier in para. 167, Section 312 empowers the court to order payment on the part of government of reasonable expenses of witnesses (including defence witnesses) attending

42. *See supray* els. (3}, {5}, *(6)* and {7), para. ***1.9****.$$}.*

before the court for the purposes of trial. Moreover it has been held that the words "may require" in Section 2.43(3) that the court has dis cretion and power to exonerate the accused from paying the reasonable expenses to be incurred by the witnesses in attending for the purpose of trial, if the court is satisfied that the accused has no means or capacity to pay such expenses.[43] This is what it should be in order to secure the ends of justice.

Section 243(2,} requires the Magistrate to summon at the instance of the accused, a witness "for examination or cross-examination", but under the proviso, the attendance of a witness is not compellable where the accused has had an opportunity of cross-examining that witness. This is, however, subject to the counter-exception expressed by the words "unless the Magistrate is satisfied that it is necessary for the purposes of justice". The Magistrate's action is, thus, hedged in a number of seemingly contradictory provisions. Further, the word "or" in the main paragraph seems to allow the summoning of a new witness only for cross-examination, which may not be desirable and is perhaps not the intention of the sub-section.[44] These things, however, would not create any serious difficulty as the subsection vests full discretion in the Magistrate and indicates that he should be guided by "the ends of justice".

The court cannot refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defence, unless it records a finding that the application for summoning the witness had been made merely for the purpose of vexation or delay or for defeating the ends of justice.[45] The Supreme Court held that a Magistrate holding an inquiry under Criminal Procedure Code in respect of an offence triable by him does not exceed his powers under Section 243(1) if in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature with the admitted signature of the accused and to reach his own conclusion with the assistance of the expert.[46] If, however, the accused wants to make use of the main part of Section 243(2} for the purpose of achieving that which is prohibited by the proviso, the proviso will apply and the court will be justified in refusing to accede to the request of the accused to summon such witness. A prosecution witness who had been

43. *Venkateswara Rao* v. *State A.C.B.*, 1979 Cri LJ 255, 257 (AP); see also, *Surinder Kumar* v. *State*, 1982 Cri LJ 548 (HP).

44. *See*, 41st Report, p. 172, para. 21.9.

45. *Sudhir Kumar Dutt* v. *R.*, (1949) 50 Cri LJ 294, 29S: AIR 1949 FC *6; Habeeb Mohammad* v. *State of Hyderabad*, 1954 Cri LJ 338: AIR 1954 SC 51, 60; *Ronald Wood Mat ha ms* v. *State of W.B.*, 1954 Cri LJ rrfii, 1163: AIR 1954 SC 455; see also, *Narayan Rajaram* v. *State of*

46. See, *Kalyani Bhaskar* v. M.S. *Sampoornam*, {2007} 2 SCC 258: (2007)

tendered for cross-examination by the accused and whom he had either cross-examined or had failed to cross-examine may still be summoned by the court if it is satisfied that it is necessary for the purpose of justice but not otherwise.[47]

If the accused, after entering upon his defence, applies to the court to issue process for compelling the attendance of any witness for the purpose of examination or cross-examination, an adjournment will have to be granted necessarily.

(b) Written statement of the accused.—If the accused puts in any written statement, the Magistrate shall file it with the record. [S. 243(1)3

The provision regarding the written statement might be of some use to an accused person who (or whose pleader) feels that his examination under Section 3x3(1)^?) has not given him a full opportunity to explain all aspects of the case.[48]

(c) Record of the evidence.—The evidence for the defence shall be recorded in the same manner and subject to the same rules as mentioned in para. 20.3(h), *supra* relating to record of evidence for the prosecution.

The same need not be repeated here.

Steps to follow the defence evidence

(1) *Court witness,*—As mentioned earlier in para. 16.6, the court can, *at any stage,* summon and examine any person as a court witness if his evidence appears to it to be essential to the just decision of the case. [S. 311]

(2) *Arguments submitted on behalf of defence.*—After the close of the defence evidence, the defence can address concise oral arguments and may submit to the court a memorandum in support of its case. This has been, provided by Section 314 which has already been discussed in para. 16.13.

(3) *Judgment.*—judgment and other related matters constitute Part (C) "Conclusion of trial" and have been discussed later in paras. 20.11 and 20.12.

20.6

B. Cases instituted otherwise than on a Police Report

Initial steps in the trial 20.7

(xj *Preliminary hearing of the prosecution case.*—In cases instituted on a police report the accused has the advantage of getting copies of the documents referred to in Section 173, and thereby he is enabled to make

47. *I'Aamuv. State,* 1975 Cr; Lj 1761, 165 (Ail).

48. *See.* 41st Report, p. 172, para. 21.8.

adequate preparations for his defence. The availability of the police report and other documents sent to the court along with such report help the court in deciding whether to frame a charge against the accused person, or to discharge him if there is "no evidence". As such copies and record are not available to the court and to the accused person in cases instituted otherwise than on a police report, a sort of preliminary hearing of the prosecution case becomes desirable. For this purpose Section 244 provides as follows:

> 244. (1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.
>
> (2} The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.

Evidence for prosecution

When the accused appears or is brought before the Magistrate, he is *required* to "hear" the prosecution and to take such evidence *as may* be produced in support of the prosecution. The word "hear" in this context obviously suggests that the court shall have to give a right of audience to the prosecution regarding the nature and character of the evidence that it wants to produce.[49]

The words "as may be produced" clearly connote that the liberty of determining the order of evidence or the production of the same or the choice of the witnesses is entirely that of the prosecution.[50] It has been held that Section 244 is wide enough to give power to a court to accept a supplemental or additional list of witnesses given by a complainant and to issue summons to them and record their evidence.[51]

It may be pertinent to note that there is difference between material collected during the process of taking cognizance and the material collected during trial. Explaining this in *Sunil Mehta* v. *State of Gujarat*[52], the Supreme Court observed thus:

> There is, however, a qualitative difference between the approach that the court adopts and the evidence adduced at the stage of taking cognizance and summoning the accused and that recorded at the trial. The difference lies in the fact that while the former is a process that is conducted in the absence of

49. *Frith vi Nath* v. R.C. *Kaul*, 1575 Cri Lj 2.16, zt8 (J&K); *Mirza Mohammed Afza'i Beg* v. *State*, 2959 Cri Lj 978, 979: AIR 1959 J8cK
50. *Prithvi Math* v. R.C. *K-:n:L* 1975 Cri Lj *2.1.6*, 221 ydcK).
51. 5. *Yivekanantham* v. A, *Viswanalhan*, 1977 Cri Lj 425, 426 (.Mad). See, *Sayeeds Farhana Shamim* v. *State of Bihar*, (2008) 8 SCC 218: (2008) 3 SCC (Cri) 449: 200S Cri Lj 3057, holding that the power of Magistrate should not be fettered. He should exercise discretion
52. (2013) 9 SCC 209: (2013) 3 SCC (Cri) 881.

the accused, the latter is undertaken in his presence with an opportunity to him to cross-examine the "witnesses produced by the prosecution.[53]

It was a case where the Magistrate despite the police report under Section 156(3) to the effect that it was essentially a civil dispute, proceeded to take cognizance and issued summons. The Magistrate went ahead with charging overturning objections on the basis of non-compliance of Section 244. The Sessions Court remanded the case to Magistrate but the High Court upheld the Magistrate's order. The Supreme Court reversed the High Court emphasising the views quoted above.

The Magistrate is required to take all the evidence that may be produced by the prosecution, and he cannot pass an order of discharge under Section 245(1) until all the witnesses produced by the prosecution are examined.[54]

(2) *Discharge of accused*.—Section 245 provides as follows:

245. (1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

When accused shall be discharged

(2} Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

At this stage of the proceedings Section 245(1) requires the Magistrate to only consider the evidence prima facie with the pointed view as to whether the evidence if unrebutted would result in conviction. He is not required to consider the entire pros and cons of the evidence at this stage.[55] Under Section 245(1), the Magistrate can discharge the accused, if upon taking all the evidence referred to in Section 244, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction.[56] For the applicability of Section 245(1) what is required is that all the evidence that may be produced is taken and not that all the evidence that the complainant intends to produce in the case has been taken. If in a case the court directs the complainant to produce all his witnesses and on the evidence he adduces, there is not even the ghost of a chance of conviction of the accused, the Magistrate has the discretion under Section 245(1} to discharge the accused without affording a further

53. *Ibid*, 887, para. u.
54. *Yasbodabai* v. *B.M. Kamat*, 1973 Cri Lj 1007, 1008 (Bom).
55. *Hukamickand Devkisen Sarda* v. *Ratanlal Rupchand Heda*, 1977 Cri
56. *Mctrutha* v. *Rajagopal*, 1972 Cri Lj 1210, 1211 (Mad); see also, *Man Mohan* v. *State of U.P.*, 1975 Cri Lj 1241, 1243 (All); *Century Spg. and M.fg. Co.* v. *State of Maharashtra*, {1972} 3 SCC 282: 1972 SCC (Cri) 495: 1972 Cri Lj 329. 335-36, 504; *Yasbodabai* v. *B.M. Kamat*, 1973 Cri LJ 1007, 1008 (Bom); observations in *R.S. Nayak* v. A.iL *Antulay*,

opportunity to the complainant to summon witnesses he is yet to produce.[57 58 59] Sections 245 and 246 are supplemental to each other and a harmonious construction must be placed on them. According to Section 245(1) if the evidence produced, as it stands, is not sufficient for a conviction, the Magistrate is duty-bound to discharge the accused. In this context, the word "presuming" in Section 246(1) clearly envisages the framing of a charge against the accused only if the evidence before the Magistrate is sufficient to warrant a conviction.[58 59]

From the reading of Section 245 itself it is obvious that an order of discharge passed by a Magistrate in a case instituted otherwise than on a police report should always be a written order and it should contain the reasons for the Magistrate discharging the accused.[39]

The intent behind Section 245(2) is that the complaint should not be allowed to be proceeded with on a charge which is a groundless one in order to prevent undue harassment of the accused persons. It is open to the Magistrate to discharge the accused without taking any evidence, if he is otherwise satisfied on materials that the charge is groundless one. It is true that ordinarily the Magistrate should record evidence and proceed under Section 244, and thereafter to take further proceedings under Section 245(1). But it is equally true that in view of the language employed by the legislature in Section 245(2) there is no bar against the Magistrate in discharging the accused even without recording the evidence in an appropriate case.[60] For instance, when a person against whom a process is issued by a criminal court feels that the process ought to have been issued either for want of any statutory sanction or on the ground that the averments made in the complaint make out no case, or on any other such ground, it would be open to the accused concerned to move the Magistrate issuing the process to discharge him even before the evidence is recorded.[61]

Sub-section {2) of Section 245 gives ample jurisdiction to the Magistrate to discharge an accused in the circumstances mentioned therein and the order in discharge can be passed at any previous stage of the case. Subsection (1), under those circumstances will not operate as a bar to the exercise of jurisdiction by the Magistrate under sub-section (a).[62] But this should not be understood that the Magistrate has arbitrary power

57. .*Pilathotiathil Mohd. Abdulla* v. *State of Kerala*, 1982. Cri Lj 465, 467 (Ker); see also, *Prem Narain Gupta* v. *Shiv Prasad Agarwal*, (T962.) r

58. *Anil Kapoor v. Finance-cum-Health Secy.*, 1974 Cri LJ 862., 864-65

59. *Kaliappan* v. *Munisamy*, 1977 Cri LJ 2038, 2039 (Mad); *Airfreight Ltd.* v. *K. Kothawala*, 1995 Cri Lj 2874 (Bom).

60. *Bhanwar Lai* v. *Kishori Lai*, 1977 CriLj 1435, 1436-37 (Raj).

61. *Gopal Chauhan* v. *Satya*, 1979 Cri LJ 446, 449 (HP); see also, *Mansoor Shah* v.

62. *Cricket Assn, of Bengal* v. *State ofW.B.*, (1971) 3 SCC 239; 1971 SCC (Cri) 446, 451: 1971 Cri Lj 1432; *K. Narendra* v_ *Arnrit Kumar*, 1973 Cri Lj 1637, 1940 (Raj); *Kafaram Gupta* v. *Dharamchand*, 1983 Cri LJ 612

to discharge the accused person. There must be grounds or material on record for coming to the conclusion that no offence is made out,[63] It has been held by the Bombay High Court that when a defendant is discharged under Section 245(a) the Magistrate has to hear the complainant.[64] Where a prima facie case is made out against the alleged offence discharge of the accused under Section 245(2) is not proper.[65]

The section requires the Magistrate to record the reasons for the order of discharge. It is difficult to define the word "groundless" used in the subsection. The question whether a particular charge is groundless entirely depends upon the circumstances in each case. No general rule or direction will be of much use to the Magistrate in deciding this question. But this much can positively be said that the Magistrate should reach his conclusion judiciously and not capriciously.[66]

(3) *Framing of charge.*—If, when such evidence as mentioned in Section 244 has been taken, or at any previous stage of the case the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused. [S. 246(1)] Under this section the Magistrate is supposed to frame charge against the accused but it does not lay down that the charge shall be framed only after evidence is taken in terms of Section 244.[67]

For the purposes of framing a charge the evidence already led must be of such a nature that if that remains unrebutted by the defence, the accused may be convicted on it.[68] The section also empowers a Magistrate to frame a charge at any previous stage of the case, that may be even after the examination of one witness. What is necessary for the Magistrate is that he must be of opinion that there is ground for presuming that the accused has committed an offence.[69]

The Magistrate cannot decide to frame a charge before any evidence has been led by the prosecution. In other words, he cannot jump over Section 245 and frame charge inasmuch as in that case the accused's right

63. *Mubammedu Noohu* v. *K. Balakrishnan,* {1964} 2 Cri LJ 92 (Ker): *Gopai Panic ker* v.
64. *Luisde Piedade Lobo* v. *Makade,* 1984 Cri LJ 513 (Bom).
65. *Mahant Abbey Dass* v. S. *Gurdial Singh,* (2972) 4 SC.C (N) 44: 1971 SCC (Cri) 244: 1971 Cri Lj 691; *Mani Kant Sohal v. Pannalal*
66. *Wahed Bux* v. *Fakhruddin.* (1942) 43 Cri Lj 491: AIR 1942 Cai 428.429; *Mehtab* v. *Nathu,* (1930) 31 Cri Lj 481: AIR 1930 Lah 461; *Kashinatha Pillai* v. *Shanmugham Pillai,* (T950) 31 Cri Lj 275, 277: AIR 1929 Mad 754; *Ganga Bux Singh* v. *State,* 1953 Cri LJ 1:888: A3R 1954 Ali 22; see
67. *Verendra Kumar* v. *Aashraya Makers,* 1999 Cri Lj 4206 (AP).
68. *Premawali Das* v. *Thakur Das,* 1975 Cri Lj 880, 882 (Pat); *Anil Kapoor* v. *Finance-ciim- Health Secy.,* 1974
69. *State* v. *Pulisk Ghosh.* 1973 Cri Lj 510, 511 (Cai); *Purushottam Kakodkar* v. *Dayanand Bandodkar,* 1.973 Cri Lj 939, 940 (Goa JCC).

to be discharged under Section 245 in the absence of prima facie case, may be infringed.[70] The phrase "at any previous stage of the case" contained in Section 246(1} has to be read in the context of the provisions of Section 244. It only means that if the Magistrate in the process of taking evidence feels at any particular stage that the evidence so far recorded was enough for the purpose of framing the charge, he can at that stage frame that charge without further taking the remaining evidence.[71]

(4) ***Explaining the charge to the accused.***—The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make. [S. 246(2}]

This Section 246(2} is analogous to Section 240(2} and the discussion relating to the latter as contained in para. 20.2(4} [IS] equally applicable in respect of this Section 246(2).

(5) ***Conviction on plea of guilty.***—If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon. [S. 246(3)]

This sub-section is exactly analogous to Section 241 which has already been discussed in para. 20.2(5) and the same discussion need not be repeated here once again.

When the facts alleged do not themselves constitute an offence, the plea of guilty cannot be made the basis for conviction. A person can be convicted on a plea of guilty only if the ingredients of the offence are made out.[72]

(6) ***Choice of the accused to recall prosecution witnesses.***—If the accused refuses to plead guilty, or does not plead guilty or claims to be tried or if the accused is not convicted under Section 246(3} above, he shall be required to state at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. [S. 246(4)] If he says he does so wish, the witnesses named by him shall be recalled. [S. 246(5)]

The purpose of this section is to secure the accused an opportunity to cross-examine the prosecution witnesses after he has been given notice of the specific charge which he has to answer. It Is clear from the express words used in this section that the duty of recalling the witnesses when an accused wants to cross-examine them is cast on the Magistrate.[73] The fact

70. *P. Ugender Rao v. J. Sampoorna,* 1990 Cri Lj 762 (All); distinguishing the Supreme Court's observations in *R.S. Nayak* v. A.R. *Antulay,* (1986} 2 SCC 716: 1986 SCC (Cri) 256: 1986 Cri LJ 1922.

71. *Sambhaji Nagu Koli v. State of Maharashtra,* 1979 Cri LJ 390, 394

72. *Aslam Ikbal Walt Mohammed* v. *State of Karnataka, 1976* Cri LJ 317,

73. *K.M. Namboodiri* v. *Unni Nair,* 1975 Cri LJ 751, 752 (Ker); *Parbati*

that the accused had cross-examined the prosecution witnesses before the charge had been framed is no reason to deny the right of cross-examination of the said witnesses after the charge.[74]

The words "at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith" suggest that reasonable time should be given to the accused person to state whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate after recording reasons can ask him to state forthwith if he so wishes.[7n]

Evidence for prosecution

(a) Examination of witnesses.—AH prosecution evidence produced in 20 8 support of the prosecution is already taken, under Section 244 before the charge is framed. This section has already been discussed in para. 20.7(1). But when the charge is framed the accused becomes aware of the exact nature of the charge or allegations against him. Therefore, in all fairness to him the accused person is asked by the Magistrate under Section 246(4) as to whether he wishes to cross-examine any of the witnesses for the prosecution whose evidence has already been taken under Section 244. If the accused says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination {if any), they shall be discharged. [S. 246(5)] The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they shall also be discharged. [S. 246(6)]

According to Section 246(6) the prosecution is entitled to examine witnesses, who have not been examined or whose names have not been mentioned in the list of witnesses before the charge is framed. If in such a case the accused wants time to cross-examine the witnesses whose names were not disclosed before the charge was framed, the Magistrate may grant time to the accused person.[76]

1972 Cri LJ 1644 (Ali): *Saghir Uddin* v. *Miunni*, {1949} 50 Cri Lj 674, 675-76: A IP. 3949 All 428: *Kunj Behan Yadav* v. *Basdeo Yadav*, 1958 Cri Lj 212, 213: AIR. 1958 Pat 104; *Bkagirathmal* v. *Sohanlal Seraogi*, 1.954 Cri Lj 5:19, 52.1: AIR 1954 Ass 69.

74. *Passang Lama* v. *State of Sikkim?* 1975 Cri Lj 135c., 1354 (Sikk); *Bhagirathmai* v. *Sohanlal Seraogi*, 1954 Cri Lj 519, 521: AIR 1954 Ass 69.

75. *Bhajja* v. *Emperor*, (1939/ 40 Cri Lj 549, 550: AIR. 1939 AH 238: *Bhagirathmai* v. *Sohanlal Seraogi*. 1954 Cri Lj 519, 521: AIR 1954 Ass *6% P ho man Singh* v. *Emperor*, (1925) 2 6 Cri Lj 1158., 1159 {Lab}; *Emperor* v. *Lake*, *h man Ramshei*, ILP. (1929) 53 Bom 578; *llamcbandra Modak* v. *Emperor*, (192 *6}* 27 Cri Lj 499, 50c: AIR 192 *6* Pat 214: *State of Karnataka* v 5. *Dhandapani Modaliar*, 1992 Cri Lj 24 (Kant).

76. *Emperor* v. *Nagindas Narottamdas.* (1972) 43 Cri Lj 761: AIR 1942 Bom 214; *Rewa Chand* v. *State*, 1955 Cri Lj n06? 1107: AIR 1955 Raj 213, 114: *State of Mysore* v. *Babasahebs* 1959 Cri Lj 1 196: AIR. 1959 Mys 238: *Hadibandbu Misra* v. R.. AIR 1950 Ori 245. 249-50; *State of Bombay* v. *janardhan*, i960 Cri Lj 1569: AIR i960 Bom 513, 514-15.

(b) Record of evidence.—The evidence in warrant cases shall be recorded according to the provisions contained in Sections 275, 277 to 280. These have already been discussed in para- 20.3(6).

20.9 Steps to follow the prosecution evidence

They are the same as mentioned in *supra,* para. 20.4 *i.e.* 1} arguments on behalf of prosecution; [S. 314] 2) examination of the accused person under Section 313(.1)(i>).

20.10 Evidence for the defence

After the completion of the prosecution evidence, arguments, and the examination of the accused under Section 3 X3 (x)(A?), the accused shall then be called upon to enter upon his defence and produce his evidence; and the provisions of Section 243 shall apply to the case. [S. 247]

Section 243 has already been discussed in para. 20.5(61), The discussion regarding written statement of the accused and record of evidence contained in para. 20.5(6) and (d, and para. 20.6 dealing with steps to follow the defence evidence, are equally applicable in respect of Section 247 but the same have not been repeated here.

C. CONCLUSION OF TRIAL

20.11 judgment and connected matters

{a) Judgment of acquittal or conviction.—After the dose of the defence and after hearing arguments the Magistrate shall give a judgment in the case. If in any case under this chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal; [S. 248(1)] and where in any case under this chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of Section 325[77] or Section 360, he shall after hearing the accused on the question of sentence, pass sentence upon him according to lave. [S. 248(2)]

If the Magistrate convicts the accused, he is required to pass sentence on him according to law. However, considering the character of the offender, the nature of the offence and the circumstances of the case, the Magistrate may, instead of passing the sentence, decide to release the offender, on probation of good conduct under Section 360 or under the Probation of Offenders Act, 1958. Section 361, as will be seen later in Chapter 23, ordains that the offenders should, as far as possible, be released under the probation or other like laws. In order to acquaint the court with the

77. For the rexr of S. 52.5, *see supra,* para.

social and personal data of the offender and thereby to enable the court to decide as to the proper sentence or the method of dealing with the offender after his conviction, Section 248(2) makes it imperative that the Magistrate shall hear the accused on the question of sentence. After an accused has been found guilty and an order to that effect has been passed, the Magistrate cannot straightway record an order of sentence. He has to pause there because the statute enjoins that he should "hear" the accused on the question of sentence.[78] Section 248(2) gives an opportunity to both parties to bring to notice of the court facts and circumstances which will help personalise the sentence from a reformative angle.[79] The sub-section does not however throw any light on the meaning and scope of the term "hearing" in relation to the question of sentence.

The provision contained in Section 248(2) is similar to one contained in Section 235(2); therefore the discussion on Section 235(2) in *supra,* para. 19.7 will be quite relevant and useful, though the same has not been repeated here.

Provisions regarding the delivery and pronouncement of the judgment, its language and content, various directions regarding the sentence and other post-conviction orders that might be passed, compensation and costs to aggrieved party etc., are all contained in Sections 353 to 365 and will he discussed later in Chapter 23.

In a warrant case, a Magistrate is competent to pass an order after the charge is framed, either acquitting the accused or convicting him for the offence. If he has to acquit the accused, he has necessarily to find him not guilty to the charge on the evidence that is already on record. But the absence of the complainant does not empower him to acquit the accused,[80]

There is no provision of law which enables a Magistrate to dismiss the complaint or pass an order of discharge in a warrant case after framing a charge. Once a charge is framed, ordinarily the Magistrate has to proceed with the trial which may ultimately result in acquittal or conviction of the accused. However, if it becomes necessary for the Magistrate, at any postcharge stage, to drop the proceedings for want of jurisdiction or maintainability without a decision on merits one way or the other,

78. *Baburao Ckandavar* v. *State.* 7977 Cri Lj 1980. 1982 {Del),

79. *Mohd. Giasuddin* v. *State of A. P..* (1977) 3 SCC 287: 1977 SCC (Cri) 496, 502: 1977 Cri Lj 1537; see also, *Santa Singh* v. *State of Punjab,* {1976) 4 SCC 1.90: 1976 SCC (Cri) 546: '1976 Cri Lj 1875; *Allauddin Mian v. State of Bihar.* (1989) 3 SCC 5: 1989 SCC (Cri) 490: 1989 Cri Lj 1466; *Suryamoorthi* v. *Govindaswamy.* (1989} 3 SCC 24: 1989 SCC (Cri) 472: 7989 Cri Lj 1451; *Anguswamy* v. *State ofT.N(7989)* 3 SCC 33: 1989 SCC (Cri) 481; *jumman Khan v. State of U.P.,* {1991} 1 SCC 752: 1991 SCC (Cri) 283: 1991 Cri I.j

80. *Jogcndra Nath* v. *Nityana?;da.* 1975 Cri Lj 1266, 1267 (Cal); *State of Mysore v. Soma!a.* 7972 Cri Lj 1478, 1480 (Mys); P. *Varadarajulu* v. *janakirama.* (1943) 44 Cri Lj 1 7 7 : AIR .1942 Mad 552(1).

the dropping of the proceedings cannot be treated as an acquittal of the accused,[81]

ip) Procedure in case of previous conviction.—Where, in any case under this chapter, a previous conviction is charged under the provisions of Section 2ii(7)[82] and the accused does no? admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused, take evidence in respect of the alleged previous conviction, and shall record a finding thereon:

Provided that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it unless and until the accused has been convicted under sub-section (a) above, [s. 248(3)]

The section provides for a special procedure for determining liability to enhanced punishment as a consequence o£ previous conviction. The object of the section in prohibiting the proof of previous conviction to be given until and unless the accused is convicted, is to prevent the accused from being prejudiced at the trial.

(c) Discharge of accused in certain cases where the complainant is absent.—When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinafter contained, at any time before the charge has been framed, discharge the accused. [S. 249]

The clauses "and the offence may be lawfully compounded" and "is not a cognizable offence" are separated by a disjunctive conjunction "or" which indicates that they are alternative and not cumulative. Thus, the section applies not only to cases where the offence is compound able one but also where though it is not compoundahle, it is non-cognizable.[83]

The discretion, which is vested in the Magistrate to discharge the accused, is to be exercised judicially and not arbitrarily.[84]

The section, has already been considered in para. 17.6 in Chapter 17 dealing with "disposals of criminal cases without full trials"; and therefore it need not be discussed over again.

81. *Harnamshi B. Digtva* v. *Thacker Vaiji Kunverji,* 1983 Cri Lj *604,* 605 (Gui); *State of Kerala* v. *Sebastian,* 1983 Cri Lj 4x6.
82. *See supra,* para. 15^(7).
83. *Kanhsi Tradhan* v. *Basanti Khali,* 1981 Cri LJ *z66, z6~* (Ori); see also, *Canesb Karajan Oangre* v. *Eknath Hari jhampe.,*
84. *Ganesh Marayan Dangre* v. *Eknath Hari jhsmpe..* 1978 Cri Lj

Compensation for accusation without reasonable cause 20.12

Section 250 provides as follows:

250. (1) If, in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that there was no reasonable ground for making the accusation against them or any of them, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show' cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one; or, if such person is not present, direct the issue of a summons to him to appear and show cause as aforesaid.

(2) The Magistrate shall record and consider any cause which such complainant or informant may shove, and if he is satisfied that there was no reasonable ground for making the accusation, may, for reasons to be recorded, make an order that compensation to such amount, not exceeding the amount of fine he is empowered to impose, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(3) The Magistrate may, by the order directing the payment of the compensation under sub-section (2}, further order that, in default of payment, the person ordered to pay such compensation shall undergo simple imprisonment for a period not exceeding thirty days.

(4} When any person is imprisoned under sub-section (3), the provisions of Sections 68 and 69 of the Indian Penal Code (45 of i860) shall, so far as may be, apply.

(5) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him:

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(6) A complainant or informant who has been ordered under sub-section {2) by a Magistrate of the second class to pay compensation exceeding one hundred rupees, may appeal from the order, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(7} When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (6), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided; and where such order is made in a case which is not so subject to appeal the compensation shall not be paid before the expiration of one month from the date of the order.

(8) The provisions of this section apply to summons cases as well as to warrant cases.

reasonable ground for the accusation. Apart from providing that compensation up to the amount of the fine which the Magistrate can impose can be awarded to the accused, it lays down the procedure governing such proceedings. Notice to the complainant is necessary, and of course he has to be heard in reply, and against the final order, an appeal lies (in certain cases). The procedure has generally been considered as satisfactory.[85]

The words "no reasonable ground for making the accusation" suggest that the test for fixing liability on the complainant for the accusation is only objective and not subjective-[86 87 88 *]

The section requires that the offence must be triable by a Magistrate; therefore where the offence is exclusively triable by a Court of Session, compensation order under Section 250 cannot be passed.[87 88]

The Magistrate who has heard the case has been empowered to order compensation; no other Magistrate or the court of appeal can pass an order of compensation under Section 250.[85]

The rationale of this position has come to be examined by the Supreme Court in *Nandkumar Krishnarao Navgire* v. *Jananatb Laxman Kushalkar*[m]. In this case, the complainant who put up the false complaint could not finally be asked to pay compensation as the Chief Judicial Magistrate who initiated the proceedings was transferred. The new incumbent refused to proceed under Section 250. The High Court upheld the view. On appeal by special leave, the Supreme Court observed:

> Now, here was a case of a Chief Judicial Magistrate who had acquitted the appellant. His jurisdiction to impose fine was only up to Rs 2000. Thus, the scope of enquiry under Section 250 CrPC is only an effort to award to the accused a bare sum of Rs 2000, if at all, after hearing the complainant. The enquiry in nature being so small and narrow, the legislature perhaps thought that it should be in the nature of an addenda to the main enquiry or trial. Therefore, the view has emerged in all the High Courts in the country that the same Magistrate alone can initiate action and pass the final orders.... It would thus be worthwhile to preserve the interpretation of the provision which would not disturb the unanimous understanding of the High Courts on the subject. We hold accordingly.[90]

85. *See,* 41st Report, p. t68, para. 20.11.
86. *See,* observations of the Bombay High Court in *Janinaprasad Sarju Tiwari* v. *Saban K. Dbone,* 1993 Cri LJ 1470 (Bom); D.M.
87. *Bansidhar Pande* v. *Chunni Lai,* 1927 Cri Lj 983: AIR 1927 All 744; *Samp Sonar* v. *Ra?n Sunder Thakurain,* 1922 Cri Lj 319: AIR 1922
88. *Baini Parshad* v. *State,* 1953 Cri Lj 1455: AIR 1955 Punj 2x2; *Ram Debi* v. *Gobind Sabai,* 1921 Cri Lj 406, 407: AIR 1921 All 122; *Mebi*

S9. (1998) 2 S CC 555: 1998 SCO (Cri) 637.
90. *ibidt* 638-39.

A person is said to be accusing another when he charges him with a fault or an offence. If the informant accuses "A" but the police on account of its investigation reaches a conclusion contrary to it and puts up "B" for trial, it will be travesty of justice to saddle the informant for causing harassment of someone whom he never accused and who came to be accused on account of the investigation over which he had no control.[91]

Sub-section (2) requires that the Magistrate has to form his own opinion as regards the merits of the accusation after he has heard the complainant when he shows cause, and then it becomes the duty of the Magistrate dealing with the matter to record a finding that the case which was brought was without any reasonable ground for the accusation. It is not sufficient compliance with the requirements of the law to record an opinion in the main judgment itself that the allegations were made in the absence of reasonable ground for the accusation.[92]

Sections 68 and 69, Penal Code, i860 referred to in sub-section (4) deal with termination of the imprisonment in default of payment of fine or proportional part of fine.

91. *Qm Prabash* v. *State of Rajasthan,* 1975 Cri Lj 196. 197 (Raj).
92. *Fakir Das Duttv. Gaya Dhar Jana,* 1.957 Cri Lj 444.445-46: AIR 1957 Cal 225; *Rameshwar v. State of Bihar,* 1975 Cri LJ *1696,* 1697 (Pat); *Kailash Chandra* v,

Chapter 21

Trial Procedures: Trial of Summons Cases and Summary Trial

Scope of the chapter 21,1

A summons case means a case relating to an offence, and not being a warrant case.[1] This then means that it is a case relating to an offence not punishable with death, imprisonment for life or imprisonment for a term exceeding two years.[2] The trial procedure prescribed for summons cases is mainly contained in Sections 251 to 259 and has been discussed in Part A of this chapter. Summons cases are tried with much less formality than warrant cases, and the manner of their trial is less elaborate. Even the method of preparing the record (of evidence) is less formal. As observed by the Law Commission:

> the scheme is simple, and the intention clearly is that these not very serious but numerous cases should be decided quickly. We agree that this is how it should be. All the essentials of a fair trial are present here, and the nature of these cases is such that a more elaborate method would only add to the expense and perhaps harassment of the parties without substantially aiding the cause of justice.[3]

1. *See supra*, S. *z{x).* para. 5.2.
2. This will be obvious after considering the detention of a warrant case given in S. *z{w), see supra,* para. 5,2..
3. 41st Report, p. 164. para. 20.1.

summary way. The procedure for summary trials is essentially one prescribed for the trial of a summons case but in an abridged form. The Law Commission in this connection has observed:

> From the point of view of procedure, a summary trial is an abridged form of the regular triai and is resorted to in order to save time in trying petty cases. Short-cuts in procedure in criminal cases are not without risks; but in view of the safeguards provided as to the type of judicial officers who may exercise this power, the nature of the offences that may be so tried and the punishment that may be inflicted in such trials, summary jurisdiction is justifiable.[4]

A. PROCEDURE FOR TRIAL OF A SUMMONS CASE

21.2 Initial steps in the trial

(a) *Explaining the substance of the accusation to the accused*.—When in a summons case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty, or has any defence to make, but it shall not be necessary to frame a formal charge. [S. 251]

The section only dispenses with a formal charge in a summons case, but it does not dispense with the statement of the particulars of the offence for which the accused is to be dealt with. The purpose of questioning the accused under the section is to apprise him of the charge against him. The accused should have a clear statement made to him: 1) that he Is about to be put on the trial, and 2) as to the offence or facts constituting the offence with the commission of which he is accused.[5] The record must show the particulars which were explained or stated to the accused by the Magistrate.[6][7]

There is a sharp divergence of opinion in the High Court on the effect of non-compliance of the provisions of Section 251. The majority of the High Courts are of the view that the mere omission to state the particulars of an offence to the accused under Section 251 is not an illegality vitiating the trial, provided no prejudice can be shown to have been caused to the accused and the accused has been examined under Section 313. It is mere irregularity curable under Section 465/ Further, in a case instituted

4. *Ibid*, p, 178, para. 2,2.1.
5. *State of Mysore* v. *Sbivanna*, 1972 Cri Lj 1146, 1147-48 (Mys); *Chinnastvamy* v. *St cite*, 1973 Cri LJ 358 (Mad).
6. *Midkraj Chabra* v. *Nagpur Corpn.*, (1965) 1 Cri Lj 148. 149: AIR 196; Bom 30; *State of Kerala* v. *Karaan Nair*, (1962} 1 Cri Lj 429, 431: AIR 1962 Ker 78.
7. *Manbodh Biswal v. Samaru Pradhan*, 1980 Cri LJ 1023 (Ori); G. *Srinivasa Kao* v. *G. Radhamma*, 1975 Cn Lj 12S7, 1289 (AP); *Public Prosecutor* v. *Sankariingarn Mo op an*, {.1919) 20 Cri Lj 395: AIR 1919 Mad 52; *Labani* v. *Kb us had* {1932} 33 Cri Lj 938, 940; AIR 1932 Nag 127: *Rajeshivara Prasad Singh* v. *Province of Bihar*, {1949) 50 Cri LJ 676: AIR 1949 Pat 323. 678-79; *Ahmed* v. *State*, 1955 Cri Lj 1066, 1067: AIR 1955 Hyd 174; *Nay an Ram* v. *Prasanna Kumar*, 1953 Cri Lj .1574, 1575: AIR 1953 Ass 61: *State of Rajasthan* v. *Bhamvarlal*, 1957 Cri Lj 994, 996: A IP. 1957 Raj 296; bur see contra, *Gopal Krishna Saba*

upon a complaint made in writing, every summons or warrant issued under Section 2.04(1) must be accompanied by a copy of such complaint. [8] Therefore, when the accused entered appearance in answer to such summons, etc., he would have a fair idea of the allegations made against him on the basis of which the summons was issued. This factor will have to be taken into consideration while deciding the question of prejudice to the accused under Section 465.[9] [10]

Section 205*[o] enables a Magistrate issuing a summons for an accused to dispense with his personal attendance and to permit him to appear by his pleader. This power is most likely to be used in summons cases. In cases where the personal attendance of the accused is dispensed with, his pleader can, in his stead, plead to the "charge", or make an answer to the statement of allegations.[11]

In the trial of a warrant case instituted on a police report the Magistrate is to satisfy himself that he has complied with the provisions of Section 207 relating to the supply of copies to the accused at the commencement of the trial.[12] In a trial of a summons case instituted on a police report there is no similar duty cast on the Magistrate. Even then free copies have to be supplied to the accused in view of the mandatory provisions of Section 207. [13]

When once there is a denial of the offence under Section 251, the Magistrate is required to proceed to hear the prosecution and to take the prosecution evidence under Section 254. The Code does not warrant the subsequent admission of guilt on the part of the accused person.[14] [15] It has been opined that an accused may not be convicted even on his admission of guilt if the prosecution report does not make out an offence under a , . . TS statute.

In a trial of a summons case it is not necessary to frame a formal charge according to the provisions of Sections 211 to 213; however, the provisions relating to joinder of charges and joint trial of persons are applicable in respect of trials of summons cases.[16]

v. *Matt Lai Singh*, {1927) 28 Cri LJ 155,156: AIR 1927 Cal 196; *Mas tan Singh* v. *State*, 1953 Cri L] 1256: AIR 1953 Pepsu 125; *Siddappa* v. *Patel Shivappa*, 1967 Cri IJ 1671: AIR 1967 Mvs 248. (Here the court held that prejudice was in fact caused to

8. *See supra*, S. 204(3). para. 11.4.
9. *Golak Nath* v. *Bapiram Bora*, 1973 Cri Lj 1372 (Gau).
10. *See supra*, para. 11.5.
31. *See*, 41st Report, p. 165, para. 20.4; *Dorahshah Bomonji Dubash* v. *Emperor*, (1926} 27 Cri Lj 440, 441-42: AIR 1926 Bom 218; *S.P. Sinha* v. *Labour Enforcement Officer*, 1976 Cri LJ 76, 78 (Cal).
12. *See supra*, S, 23S, para. 20.2(1).
13. *See supra*, para. 11.7: see also, *Veerappa*, *re*, 1959 Cri LJ 1092, 1095: AIR 1959 Mad 405; *Chinnaswamy* v. *State*, 1973 Cri LJ 358 (Mad); observations in *Viniyoga International* v. *State*, 1985 Cri LJ 761, 766-67 (Del).
14. *Sehn*, *re*, 1975 Cri LJ 113 (Mad).
15. *Pumsbotam Sabra* v. *State of Orissa*, 1992 Cri Lj 1417 (Ori).
16. *Upendra Nath Biswas v. Emperor*, ILR {1913) 41 Cal 694, 702-03; *Indramani* v. *Chanda Bewa*, 1956 Cri LJ 1218, 1219: AIR 1956 Ori 191, 192; *K.S. Imam Sahib*, *re*,

It has been held by the Supreme Court that the recall of the summons is permissible before recording the plea of the accused under Section 252 discussed below. This would mean that before the accused records his plea on the initial questioning under Section 251, the power to recall summons can be exercised.[17]

(b) *Conviction on plea of guilty*.—If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him thereon. [S. 252] If the accused pleads guilty, it is imperative that the Magistrate shall record the plea of guilty as nearly as possible in the words used by the accused. This requirement of Section 252 is not a mere empty formality but is a matter of substance intended to secure proper administration of justice. It is important that the terms of the section are strictly complied with because the right of appeal of the accused depends upon the circumstance whether he pleaded guilty or not, and it is for this reason that the legislature requires that the exact words used by the accused in his plea of guilty should be as nearly as possible be recorded in his own language in order to prevent any mistake or misapprehension.[18] If there are a number of accused persons, the plea of each of the accused should be separately recorded and in his own words after the accusation was read over to each one of them. Where there are number of accused persons and the accusation is read over to them jointly and the Magistrate records their plea of admission jointly, such admission is bad in law.[19] If the facts mentioned in the "charge?' do not constitute the offence, the mere plea of guilty cannot render the accused liable to be convicted on such plea which does not contain any admission constituting all the ingredients of the offence.[20]

The requirements of Section 252 are mandatory in character and a violation of these provisions vitiates the trial and renders the conviction legally invalid.[21]

The Magistrate has discretion to accept or not to accept the plea of guilty. If he decides to accept the plea of guilty he can call evidence to decide the question of proper sentence.[22]

Lj 71: AIR 1954 Mad *86*, 87. *See also supra*, para. 15.15.

17. *Subramanium Sethuraman* v. *State of Maharashtra,* (2,004} [13] SCC 524: 2005 SCC (Cri) 242: 2004 Cri LJ 4609. Also see, *Adalat Prasad* v. *Rooplal jindal,* (2004) 7 SCC 538: 2004 SCC (Cri) 1927 which was a warrant case.
18. *Mahant Kaushalaya Das* v. *State of Madras*, 19 6 & Cri LJ *66*, 68: AIR 1966 SC 22; *Aithappa* v. *State of Mysore*, 1973 Cri Lj 360 (Mys).
19. *State of Mysore* v. *Shiv anna*, 1972 Cri Lj 1146, 1148 (Mys); *Chhotu Bhagirath* v. *State of Gujarat*, 1972 Cri Lj 548, 550 (Guj); *Hansraj* v. *State*, 1956 Cri Lj 1267,1270: AIR 1956 AH 641; see also, *Anand Vithoba Lohkare* v. *State of Maharashtra*, 1999 Cri Lj 2857 (Bom),
20. *State of* ALP, v. *Kapurchand*, 1973 Cri LJ 417, 419 (MP).
21. *Mahant Kaushalaya Das* v. *State of Madras, 1966* Cri LJ *66, 63:* AIR 19 *66* SC 12; *Chain Bhagirath* v. *State of Gujarat*, 1972 Cri LJ 548, 550-51 (Guj).
22. *Emperor* v. *Janardan Kashinath Ahbyankar*, (1931} 32 Cri LJ 7x9, 720: AIR 1931 Bom 195 (FB).

Before accepting the plea of guilty it is the bounden duty of the Magistrate to satisfy himself that the concerned accused has understood the charge or the substance of the accusation against him and the concerned accused has after understanding the same pleaded guilty and also after realising the consequences that follow.[23]

If the Magistrate accepts the plea of guilty and convicts the accused person, he shall pass sentence on him according to law unless he proceeds in accordance with the provisions of Section 32*s*[24] or Section 360[25]. [S. 2.55(2}]

A Magistrate may convict the accused of any offence triable under this part of the chapter, which from the facts admitted he appears to have committed, whatever may be the nature of the complaint or summons, if the Magistrate is satisfied that the accused would not be prejudiced thereby., [S. 255(3)] Tfhis "ill be further discussed in para. 21.6(c).

(c) *Conviction on plea of guilty in absence of accused in petty cases*.—As seen earlier in para, *11,6,* it has been provided by Section 206 that in the case of certain petty offences, an accused who is willing to plead guilty need not appear in the court either in person or through his pleader provided he satisfies the conditions of that section, The object obviously is to avoid unnecessary trouble to offenders who have committed petty offences and are willing to pay the penalty,[26] Section 253 prescribes the procedure where a person to whom a summons has been issued under Section 206 has transmitted to the Magistrate his plea of guilty without appearing before such Magistrate. Section 253 reads as follows:

Conviction on plea of guilty in absence of accused in petty[1] cases

> 253. (x) Where a summons has been issued under Section 206 and the accused desires to plead guilty to the charge without appearing before the Magistrate, he shall transmit to the Magistrate, by post or by messenger, a letter containing his plea and also the amount of fine specified in the summons.
>
> (2) The Magistrate may, in his discretion, convict the accused in his absence, on his plea of guilty and sentence him to pay the fine specified in the summons, and the amount transmitted by the accused shall be adjusted towards that fine, or where a pleader authorised by the accused in this behalf pleads guilty on behalf of the accused, the Magistrate shall record the plea as nearly as possible in the words used by the pleader and may, in his discretion, convict the accused on such plea and sentence him as aforesaid.

The provision is only an enabling one. The Magistrate has been given the discretion to convict and sentence the accused person on such a plea of guilty. The section allows a lawyer appearing on behalf of the accused person to plead guilty on his behalf.

23. *State of Karnataka* v. *Mallappa Shidiingappa Gan gag* 1979 Cri Lj 14-Sr., 14S4
24. See. *supra,* para. 14.3(a).
25. S. 360 and other allied matters and the sentencing process have been discussed
26. *See,* 41st Report, p. 164, para. 20.2.

21.3 Hearing of the prosecution cases

(a) Hearing the prosecution.—If the Magistrate does not convict the accused under the above Section 252 or Section 253, the Magistrate shall proceed to hear the prosecution. [S. 254(1)] Hearing the prosecution in the context of the provisions means that the Magistrate shall give audience to the prosecution and shall allow it to open its case by giving the facts and circumstances constituting the offence and stating by what evidence it proposes to prove its case.[27 28]

(b) Evidence for the prosecution,—The Magistrate shall then take all such evidence as may be produced in support of the prosecution. [S. 254(1)]

The Magistrate may, if he thinks fit, on the application of the prosecution, issue a summons to any witness directing him to attend or produce any document or thing. [S. 254(2)] The Magistrate may, before summoning any witness on such application, require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in court. [S. 254(3)] However, as mentioned earlier, the court has power under Section 312 to order payment on the part of government of reasonable expenses of witness attending before the court for the purposes of trial.[25]

(c) Record of evidence.—In all summons cases tried before a Magistrate, the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of his evidence in the language of the court. However, if the Magistrate is unable to make such memorandum himself, he shall, after recording the reason of his inability, cause such memorandum to be made in writing or from his dictation in open court. [S. 274(1)] Such memorandum shall be signed by the Magistrate and shall form part of the record. [S. 274(2)]

The Magistrate is under a legal duty to examine witnesses and to make a memorandum of the substance of their evidence in the language of the court,[27 28 29]

Provisions regarding the interpretation of evidence to the accused or his pleader in certain cases, [S. 279] and the recording of the remarks respecting the demeanour of the witness, [S. 280] are the same as are applicable in respect of evidence recorded in a trial before a Court of Session or in a trial of a warrant case, and the same have already been discussed in para. *19.3{b}{$)* and (7).

(d) Arguments on behalf of the prosecution.—Section 314 enables the prosecutor to submit his arguments after the conclusions of the prosecution

27. *Mirza Mohammed Afzal Beg* v. *State*, 1959 Cri LJ 978, 979: AIR 1959 J&K 77; *Kazi and Khatib*
28. *See supra*, para. *i6.j.*
29. 5. *Ramachandra* v. *State of Karnataka*, 1979 Cri LJ (NOC) 183:

evidence and before any other fUrther step is taken in the proceedings. Section 314 has already been discussed in para. 16.13.

Personal examination of the accused 21.4 In

every trial, for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him, the court is required, after the witnesses for the prosecution have been examined and before he is called on for his defence, to question him generally on the case. However, in a summons case where the court has dispensed with the personal attendance of the accused, the court has got the discretion to dispense with the abovementioned examination of the accused. [S. 313(1) (6) p° Section 313 has already been discussed In detail in para. 16.9 and the

same need not be repeated here once again.

21.5

Hearing of the defence case

{a} Hearing the accused and evidence for the defence.—After the personal examination of the accused, if any, under Section 313(x)(h?), the Magistrate shall "hear" the accused and take all such evidence as he produces in his defence. [S. 2.54(1)]

The Magistrate may, if he thinks fit, on the application of the accused, issue a summon to any witness directing him to attend or produce any document or other thing. [S. 254(2)] The Magistrate may, before summoning any witness on such application, require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in court. [S. 254(3)] However, as mentioned earlier, the court has power under Section 312 to order payment on the part of government of reasonable expenses of witnesses attending before the court for the purposes of trial.[30 31]

When Section 254(1) requires that the Magistrate shall hear the accused, it certainly means that he should ask the accused what he has to say in his defence against the incriminating evidence which is brought on record against him and the accused should be heard on every circumstance appearing in evidence against him. The accused must be examined under this section whether he offers to produce the defence or not after the entire prosecution evidence w[T]as adduced. Failure to hear the accused amounts to a fundamental error in a criminal trial and it is an error that cannot be cured by Section 465.^ However, if the prosecution itself is unreliable, and cannot warrant itself conviction of the accused, the mere ritual of asking the accused formally whether he wants to be heard and [30 31 32]

30. See, *S.R. Jhunjhunwalla* v. *B.N. Poddar*, 1988 Cri Lj 51 (Cal); also see, *Sachchida Nand* v. *Pooran Mai*, 1988 Cri Lj *511* {Raj}.
31. *See supra*, para. 16.7.
32. G. *Srinivasa Rao* v. G. *Radbamma*, 1975 Cri Lj 1187, 12.90 LAP).

produce his defence evidence need not be observed. Because that would not serve any useful purpose.[33 34]

(6) *Record of evidence for defence*.—The same provisions as are applicable in respect of record of evidence for the prosecution as mentioned in *supra,* para. 21.3(c), are equally applicable to the record of defence evidence and the same need not be repeated here.

(c) Arguments.—After the closure of the defence evidence, the defence may submit its arguments. This has been provided by Section 314 which has already been discussed in para. 16.13.

Special Course to be adopted by the Magistrate.—Where the Magistrate considers:

{a) that he is not having necessary jurisdiction, [S. 32.2] or

(b) that the case should be committed to the Sessions Court for trial,

[S. 3A3.1"

{c) that he may not be able to pass sufficiently severe sentence, he shall follow the procedure applicable in similar circumstances in a trial or a warrant case before a Magistrate.

21.6 Acquittal or conviction

[a) Acquittal.—If the Magistrate, upon taking the evidence for the prosecution and for the defence, and such further evidence, if any, as he may on his own motion, cause to be produced, finds the accused not guilty, he shall record an order of acquittal. [S. 255(1)]

When the prosecutor has sought the assistance of the court for securing the attendance of the witnesses, it is not permissible for the court to refuse to take steps for securing their attendance and at the same time pass an order acquitting the accused on the ground that the case fails for want of evidence. The Magistrate has no discretionary power to refuse to take steps for the attendance of the witnesses to whom the court had already issued summons on a prior occasion for their appearance,[31] and more particularly when he has no material before him to show that there had been any remissness on the part of the prosecuting agency.[33 34 35]

But if the prosecution did not take proper steps to produce the witnesses or ask the court to give them time to do the same, or to issue fresh summons, the court was not bound to fix another date. Under such

33. *Raja Ram Trehan*
34. *State of Tripur*
35. *State of Karna*

circumstances, the Magistrate can record an order of acquittal under Section 255, if there is no evidence to hold the accused guilty.[36]

(b) *Conviction and sentence.*—Where the Magistrate does not proceed in accordance with the provisions of Section 325 or Section 360 he shall, if he finds the accused guilty, pass sentence upon him according to law. [S. 255(2)]

Section 325 referred to above has already been discussed in para. 14.3(a)

(1) . If the Magistrate convicts the accused, he is required to pass sentence

on him according to law. However, considering the character of the offender, the nature of the offence and the circumstances of the case, the judge may, instead of passing the sentence, decide to release the offender, on probation of good conduct under Section 360 or under the Probation of Offenders Act, 1958. Section 361, as will be seen in Chapter 23, ordains that the offenders should, as far as possible, be released under the probation or other like laws.

Provisions regarding the delivery and pronouncement of the judgement, its language and content, various directions regarding the sentence and other post-conviction orders that might be passed, compensation and costs to the aggrieved party, etc. are all contained in Sections 353 to 365 and will be discussed later in Chapter 23.

(c) *Accused can be convicted of an offence not "charged".*—A Magistrate may under Section 352 or Section 355 convict the accused of any offence triable under this chapter *[i.e.* Chapter XX of the Code, and Part A of this chapter], which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons, if the Magistrate is satisfied that the accused would not be prejudiced thereby. [S. ²55('3)]

According to Section 221 (2),[37] a person charged with one offence maybe convicted of another offence for which he might have been charged but was not charged. As there may be no charge framed in a summons case, a somewhat similar provision has been made in Section 255(3) which says that a Magistrate may convict the accused "of any offence triable under this chapter which from the facts admitted or proved he appears to have committed whatever may be the nature of the complaint or summons'5. The language used here Is very wide, but it is not the intention of the section that a person accused of a particular offence triable as a summons case, can be convicted of a totally different and unconnected offence about which he may never have been questioned and against which he may never

36. *State of M..P.* v.

37. *See supra,* para . 15.11.

have defended himself.[58] Therefore, rhe words "if the Magistrate is satisfied that the accused would not be prejudiced thereby" become very significant and important as they are intended to safeguard the interests of the accused
38 39
person.

21.7 Non-appearance or death of complainant

If the summons has been issued on complaint, and on the day appointed for the appearance of accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything herein before contained, acquit the accused, unless for some reason he thinks it proper to adjourn rhe hearing of the case to some other day. However, where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. [S. 256(1)] The Supreme Court in one case did not approve of the dismissal of the complaint for non- appearance of the complainant at the stage of defence evidence.[38 39 40] The Andhra Pradesh High Court ruled that exemption from appearance in court granted to complainant may be extended to the defendant also.[41]

The above provisions contained in Section 256(1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death. [S. 256(2)] In a case wherein the representatives of the dead complainant did not appear in the court 15 times whereas the defendant appeared, the defendant came to be acquitted. This was upheld by the Supreme Court.[42]

Section 256 has already been discussed in detail in *supra,* para. and the same need not be repeated here.

21.8 Withdrawal of complaint

If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn. [S. 257]

The question whether in a summons case instituted upon a private complaint, a relative of the complainant could be allowed to withdraw the

38. *See*, 41st Report, pp. *166-67,*
39. *See,* observations in *Gcmpati*
40. S. *Anand* v. *Vasmnathi Chandrasekar*, (2008) 4 SCO
41. *Hityala Venkatareddy* v. *State*
42. *Si. Rama Krishna* v. *S. Rami Reddy*, (2008} 5

complaint was answered in the negative by the Karnataka High Court; here a relative of the deceased complainant was permitted to continue with the trial[43]

The above section has already been discussed in *supra,* para. 17.4. That discussion is relevant here also.

Power to stop proceedings in certain cases

21.9

In any summons case instituted otherwise than upon complaint, a Magistrate of the First Class or with the previous sanction of the Chief Judicial Magistrate, any other judicial Magistrate may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgement and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgement of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge. [S. 258]

The above section has been discussed in *supra,* para. 17.5. This discussion, though relevant and useful here, need not be repeated.

Power of court to convert summons cases into warrant cases

21.10

When in the course of the trial of a summons case relating to an offence punishable with imprisonment for a term exceeding six months, it appears to the Magistrate that in the interests of justice the offence should be tried in accordance with the procedure for the trial of warrant cases, such Magistrate may proceed to rehear the case in the manner provided by this Code for the trial of warrant case and may recall any witness who may have been examined. [S. 259]

It was felt necessary that the Magistrate should have the power to convert the summons case into a warrant case in serious cases if he considers it necessary to do so in the interest of justice.[44] It may be noted that if the case is so converted into a warrant case, the proceedings would commence from the start.

Compensation for accusation without reasonable cause

21.11

Section 250 which provides for such compensation applies to summons cases as well.[45] The section has already been discussed in *supra,* para. 20.12.

B. Summary trials

judicial officers empowered to try summarily

21.12

Summary trial is an abridged form of regular trial and is a short-cut in procedure. Considering the risks involved in such short-cuts, it was

43. *S. Kcddappa* v. *Vi jay a* M., 1997 Cri
44. *See,* joint Committee Report, p. xx.
45. *See supra,* sub-s. (8), S. 250, para.

considered necessary that only senior and experienced judicial officers should he empowered to try certain petty cases summarily.

According to Section 260(1), notwithstanding anything contained in the Code

(a) any Chief judicial Magistrate;

(b) any Metropolitan Magistrate;

(c) any Magistrate of the First Class specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the offences mentioned in para. 21.13. [S. 260(1)]

id) Further, the High Court may confer on any Magistrate invested with the powers of a Magistrate of the Second Class power to try summarily any offence which is punishable with fine or with imprisonment for a term not exceeding six months with or without fine and any abetment of or attempt to commit any such offence. [S. 261]

It may be noted here that if any Magistrate not being empowered by law in this behalf tries an offender summarily, then according to clause fm) of Section 461 his proceedings shall be void.

Simply because a case triable summarily does not necessarily mean that the Judicial Officer empowered to try it in a summary way must try it summarily. The Magistrate has the discretion to decide it; the discretion, however, is to be used judicially having regard to the circumstances of each case. In serious or complicated cases it would not be just and proper to have summary trials.[45] On the other hand, if an offence can be tried summarily then merely because an accused person happens to be a government servant and his conviction would result in dismissal from service causing serious loss to him, the Magistrate shall not refuse to try him summarily.[46 47]

21.13 Offences triable in a summary way

For obvious reasons all offences cannot be made triable summarily. The risk inherent in the abridged form of procedure is taken only in respect of petty cases with a view to save time.

Any Chief Judicial Magistrate, any Metropolitan Magistrate or any Magistrate of the First Class specially empowered in this behalf by the High Court may try in a summary way all or any of the following offences:

U) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years; [46 47]

46. *Dina Nath* v. *Emperor*, (1913) 14 Cri Lj 103, 106: ILR (1913) 35 Ail 173; *Emperor* v.

47. *jagmalaram* v. *State of Rajasthan*, 19S2 Cri Lj 2314, 231s (Raj); but see contra,

(ii) theft under Section 379, Section 380 or Section 381, Penal Code, i8ho (IPC), where the value of the property stolen does not exceed two thousand rupees;

(in) receiving or retaining stolen property, under Section 411 IPC, where the value of the property does not exceed two thousand rupees;

(iv) assisting in the concealment or disposal of stolen property, under Section 414 IPC, where the value of such property does not exceed two thousand rupees;

(v) offences under Sections 454 and 456 IPC *{i.e.* "lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment", and "lurking house-trespass or house-breaking by night"):

(vi) insult with intent to provoke a breach of the peace, under Section 504, and criminal intimidation, under Section 506 IPC, punishable with imprisonment for a term which may extend to two years, or with fine, or with both,[48]

{vii) abetment of any of the foregoing offences;

(viii) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(ix) any offence constituted by an act in respect of which a complaint may be made under Section 20, Cattle-Trespass Act, 1871.

[S. 260(1)]

The offence of "insult with intent to provoke a breach of the peace" under Section 504 IPC referred to in clause *(vi)* above is punishable with imprisonment for a term which may extend to two years at the most. It can, therefore, be easily covered by clause (i) above and it was not quite necessary to include it specially in clause *(vi).*

Clause *ii)* refers to all offences irrespective of the fact whether any such offence is committed under the Penal Code or any other special enactment.[49]

Procedure to be followed in summary trials

21.14

(a) *Summons case procedure subject to the provisions of Sections z6z to* 267.—In trials under Part B of this chapter the procedure specified in this Code for the trial of summons case shall be followed except as hereinafter mentioned. [S. 162(1)]

Cases relating to offences covered by clauses *(ii)* to *(vi)* are mostly warrant cases. However, as the maximum punishment that can be awarded in a summary trial being only three months' imprisonment as provided by

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49. *Parkasb Qhand* v_ *State.,* 1[A]77 Cri Lj 1674, 1675

Section 2,62(2.), and as the offences are triable only by specially empowered Magistrates and other Senior Magistrates, it has been considered expedient to follow the summons case procedure. It was felt that no particular advantage would be gained by following the more complicated warrant case procedure if such warrant cases are to be tried summarily only.[50 51 52]

(b) *Prmishment awardable.*—No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Part B of this chapter. [S. 262(2)] However, there is no restriction on the amount of fine that can be imposed in accordance with law.

(c) *Summary trial to be given up in favour of regular trial.*—When, in the course of a summary trial, it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to rehear the case in the manner provided by this Code. [S. 260(2)]

If there is a change from summary to regular trial, the trial from its inception must be conducted in the regular manner.[31]

But if a case was tried as a summons case by one Magistrate though it could have been tried summarily, there is no need for the successor Magistrare to restart the case from its inception. On the contrary, it is possible for him to start the case from the stage where the predecessor left.[32]

21.15 Record in summary trials

In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:

(a) the serial number of the case;

(b) the date of the commission of the offence;

(c) the date of the report or complaint;

{d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused; *if)* the offence complained of and the offence (if any) proved, and in cases coming under clause *(ii),* clause *{Hi)* or clause *{tv)* of Section 260(1), the value of the property in respect of which the offence has been committed;

{g) the plea of the accused and his examination (if any);

(h) the finding;

(/) the sentence or other final order;

(/) the date on which the proceedings terminated. [S. 263] [50 51 52]

50. *See,* observations
51. *State of Gujarat* v.
52. K. *Jayachandran*

Regarding "the offence complained of' mentioned in clause *(f)* above, it is the duty of the trial court to give the substance of the offence by mentioning necessary facts which constituted the offence.[53]

Judgment in cases tried summarily

21,16

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. [S. 264]

The judgment should be such as to enable a court of appeal or revision to know from its perusal, the nature of the case, the substance of the evidence and the reasons for the finding so that such courts might be in a position to examine the correctness or propriety or illegality of such finding.[54]

The judgment referred to above in Section 264 is in addition to the record that has to be maintained under Section 263. The record maintained under Section 263 and the judgment under Section 264 are distinct and separate.[55]

Language of record and judgment

21,17

Every such record shall be written in the language of the court. [S. 265(1)] The High Court may authorise any Magistrate empowered to try offences summarily to prepare the aforesaid record and judgment or both by means of an officer appointed in this behalf by the Chief judicial Magistrate, and the record or judgment so prepared shall be signed by such Magistrate. [S. 265(2)]

C. FLEA BARGAINING

Chapter XXI-A consisting of Sections 265-A to 265-L was inserted into the Criminal Procedure Code (CrPC) vide the Criminal Law (Amendment) Act, 2005 with effect from 5 July 2006. Plea bargaining could be resorted to only in the cases of offences other than the offences for which the punishment of death or of imprisonment for life or imprisonment for a term exceeding seven years are prescribed. Requests for plea bargaining can be initiated only at the stage of cognizance of the offence by the court. Offences involving socio-economic conditions of the country or offences against women and children below 14 years of age are excluded from the purview of plea bargaining.[56] The offences involving socio-economic conditions for the time being in force shall be notified by the Central Government,

53. *Court on its own Motion* v. *Sh. Sbankroo.* 1983 Cri Lj 63, 64 (HP).
54. *Sankaran Unni Vasudevan Unni* v. *Rasheed.* 1980 Cri Lj 304, 306
55. *Ibid,* 305 (Ker).
56. S. 2,65-A. See, *Lokesh* v. *State,* (zon) 184 DLT 680.

Application for plea bargaining

The accused has to initiate steps for plea bargaining by way of an application with its accompaniments. In this respect Section 2.65-B(z) enacts:

> 265~B. (2) The application under sub-section {1} shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.

On receipt of application for plea bargaining, the court may require ail the parties concerned such as the complainant, public prosecutor and the accused to appear in the court and it may examine the accused in camera to ascertain whether he had voluntarily given the application for plea bargaining. The Code enacts that where:

> *(a)* the court is satisfied that the application has been filed by the accused voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case;
>
> {*b*} the court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of this Code from the stage such application has been filed under sub-section (1).

The court on satisfying that the accused had voluntarily made the application, it will be processed as provided for in the section. The procedure laid down in this chapter has been held to be mandatory.[57] If it is not done in accordance with the procedure, revision will lie and the case may be remitted to the trial court.[58] If it becomes known that the accused was in fact coerced to make the application as indicated above, he may be tried in accordance with the usual procedure and not under this chapter. The Code enacts guidelines for mutually satisfactory disposition in Sections 2.65-C and 2.65-D, which state as under:

57. See, *Rajesh Narayan*

58. *V. Subra manian* v.

Guidelines for mutually satisfactorv

265-o. In working out a mutually satisfactory disposition under clause a of sub-section (4) of Section 265-B, the Court shall follow the following procedure, namely:—

(a) in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case:

Provided that throughout such process of working out a satisfactory disposition of the case, it shall be the duty of the Court to ensure that the entire process is completed voluntarily by the parties participating in the meeting:— Provided further that the accused may, if he so desires, participate in such meeting with his pleader, if any, engaged in the case;

(b) in a case instituted otherwise than on police report, the Court shall issue notice to the accused and the victim of the case to participate in a meeting to work out a satisfactory disposition of the case: Provided that it shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition of the case, that it is completed voluntarily by the parties participating in the meeting:

Provided further that if the victim of the case or the accused, as the case may be, so desires, he may participate in such meeting with his pleader engaged in the case.

Report of the mutually satisfactory disposition to be submitted before

265-o. Where in a meeting under Section 265-C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (r) of Section 265-B has been filed in such case.

It is pertinent to note that in the cases instituted on police report the victim's counsel is not seen authorised to participate in the process of working out a disposition. On the contrary, in complaint cases, it is provided that the complainants, if so desire, could participate with their pleaders. Probably, it may be the intention that the interests of the victim could be taken care of by the Public Prosecutor. But it seems that in the changed circumstances this position should be revised.

The execution of plea-bargained dispositions has also been provided for. The court may give the benefit under Section 360 CrPC or under provisions of the Probation of the Offenders Act, 1958 or any other such law in dealing with the offenders while disposing of the case in the light of the dispositions.

In cases involving minimum sentences the court may give half the minimum on plea bargaining. In other cases it can award one-fourth of the punishment.[59] It has been opined that *even* while awarding one-fourth of sentence to an accused under plea-bargaining process, the court has

59, *See*, S. 265-B.

to look into the mitigating factors to reduce the quantum of sentence.[60] The Bombay High Court has ruled that the courts have no jurisdiction to award sentence other than that provided for in Section 2.65-E(u)-[61] The judgment passed by the court shall be final. All appeal except special leave petition under Articles 226 and 227 have been barred.

It has been provided that the rule of set off under Section 428 CrPC will be applicable to the sentence awarded under this chapter. The accused's statement given under this chapter for plea bargaining cannot be used for any other purpose.

An accused cannot have the benefit under this chapter if he does not opt for plea bargaining.[62] This chapter is not applicable to the proceedings under the juvenile Justice (Care and Protection of Children) Act, 2000.

60. See, *Ranbir Singh* v. *State*, (2012} 1 RCR
61. See, *Guerrero Lugo Eluia Grissel* v.
62. *Thomas v. State of Kerala*, 2013 Cri LJ 825

Chapter 22

Trial Procedures: Special Rules of

Scope of the chapter 22,1

The chapter is divided into two parts- Part A deals with provisions con- rained in Sections 284 to 290 relating to commissions for the examination of witnesses; and Part B discusses the provisions of Sections 291 to 299 dealing with certain special rules of evidence to facilitate proof and to reduce the time and expenditure involved in the production of certain kinds of evidence.

Sections 284 to 290 give the procedure for issuing commissions for the examination of witnesses and for the execution of such commissions. These provisions are applicable in respect of witnesses in the territories to which the Code extends. They also apply in case of witnesses in areas in India but outside those territories, and of witnesses outside India. It may, however, be noted that these provisions have to be sparingly used; because, as has been held in several cases, examination on commission is an exception rather than the rule.[3]

The fundamental basic principle of judicial procedure is that the evidence of one party should not be received against another party without the latter having an opportunity of testing its truthfulness by cross-examination.[1 2] The provisions of Sections 293: to 299 have, for varied

1. *State of Delhi* v. *Krishnaswamy** (1955; 56 Cri LJ 72: AIR 1954 Punj 294, 295; *Dharamanand Pant* v. *State ofU.P1957* Cri LJ 894, 898: AIR 1957 SC 594, 598: *Gulabrao* v. *$.D. Raje*, 1973 Cri Lj 948. 950 (Bom); *Mohd. Shaft* v. *Emperor*, {1932) 33 Cri Lj
2. *Suleman* v. *State of Gujarat*, {1961) 2 Cri Lj 78: AIR 1961 Guj 120. 123.

reasons, created some exceptions to this fundamental basic principle. The exceptions are, however, subject to certain safeguards.

A. COMMISSIONS FOR THE EXAMINATION OF WITNESSES

22.2 Dispensing with the attendance of witness by issuing commission for his examination

Whenever, in the course of any inquiry, trial or other proceeding under the Code, it appears to a court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such a witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this chapter. [S. 284(1)]

As a general rule every witness ought to be present in court where the case is tried because of the various advantages that are derived by such presence not only to the court but also to the accused.[3] Therefore, though the court has got discretion in issuing a commission for the examination of witnesses, that discretion should be used sparingly and only in the clearest possible case.[4] As a general rule it may be said that the important witnesses on whose testimony the case against the accused person has to be established, must be examined in court and usually the issuing of a commission should be restricted to formal witnesses or such witnesses who could not be produced without an amount of delay or inconvenience unreasonable in the circumstances of the case.[5] The discretion to be used by the court or Magistrate in issuing a commission is a judicial one and should not be lightly or arbitrarily exercised.[6] If the evidence against the accused is recorded in his presence and in open court, he gets an opportunity to challenge the testimony against him by cross-examination, and the court is enabled to see the witnesses and observe their demeanour. This aspect is to be borne in mind while exercising the discretion to issue commissions for the examination of witnesses.

Where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness, [proviso to S. 284(1)] The principle on which this proviso seems to be based is that the head of the State should not be summoned in court. The proviso is mandatory. Even if the

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President, the Vice-President or the Governor or the Administrator wishes to be examined in the court, that cannot be done/

The court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution. [S. 284(a)]

The above Section 284(2) gives a discretion to the court, and it may well be assumed that similar discretion is there to a Magistrate issuing a commission for the examination of witnesses though the word Magistrate has not been used in the section. The court or Magistrate has been given discretion to require payment by the prosecution of such expenses as the court or Magistrate considers reasonable to enable the accused and his counsel to participate in the examination on commission. It may be noted that such payment is however confined to cases where a commission is issued for the examination of a *prosecution witness.*

The question whether a complainant can be examined on commission has been answered in the negative. In a case, the complainant's request to be examined on commission due to his old age and ill-health was rejected by the court asserting that he would not be covered under Section 284 of the Code. According to the court, the complainant's privilege as a witness has to surrender to his duties as a complainant and to the rights of the accused.[8]

Commission to whom to be issued

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1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found. [S. 285(1)] 2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such court or officer as the Central Government may, by notification, specify in this behalf. [S. 285(2)] 3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such court or officer, and. sent to such authority for transmission, as the Central Government may, by notification, prescribe in this behalf. [S. 285(3)]

The provisions contained in Sections 285 and 290[7][8][9] of the Code contain complementary provisions for reciprocal arrangements between the government of our country and the government of a foreign country for

7. 41st Report, pp. 32,3-24. para. 40.3.
8. *R. Gopalan* N4rVv. *State,* 19S5 Cri Lj 723, 724 (Ker).
9. For S. 290, *see infra,* para. *22.6.*

commission from courts in India to specified courts in the foreign country for examination of witnesses in the foreign country and similarly for commissions from specified courts in the foreign country for examination of witnesses residing in our country.[10] [11] When it appears that reciprocal arrangements within the meaning of Sections 285 and zpo are not made, courts would not make orders in vain for the issue of commission under Section 285(3}"

22.4 Execution of commissions

Upon receipt of the commission, the Chief Metropolitan Magistrate or Chief Judicial Magistrate, or such Metropolitan or Judicial Magistrate as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant-cases under this Code. [S. 286]

The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, court or officer to whom the commission is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories. [S. 287(1)] Generally speaking, witnesses in a criminal case should not be examined on commission except in extreme cases of delay, expense or inconvenience and in particular the procedure by way of interrogatories should be resorted to in unavoidable situations.[12]

Any such party as is referred to above may appear before such Magistrate, court or officer by pleader, or if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness. [S. 287(2)]

22.5 Return of commission

After any commission issued under Section 284 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the court or Magistrate issuing the commission; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record. [S. 288(1)]

010. *Ratilal Bhanji Mitbani* v. *State of Maharashtra*, (1972) 3 SCC 793: 1972 SCC (Cri) 86r. 865: 1972 Cri Lj 1055.

11. *Ibid*, 79S.

12. *Dhammcmand Pant* v. *State* oJU.P1957 Cri LJ 894, 898: AIR 1957 SC 594,

Any deposition so taken, if it satisfies the conditions prescribed by Section 33, Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another court. [S, 288(2)]

Section 33, Evidence Act provides as follows:

33. *Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.*—Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot he obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Execution of foreign commissions **22.6**

Section 290 provides as follows:

Execution of foreign commissions

290. (1) The provisions of Section 286 and so much of Section 287 and Section 2S8 as relate to the execution of a commission and its return shall apply in respect of commissions issued by any of the Courts, judges or Magistrates hereinafter mentioned as they apply to commission issued under Section 284.

(2) The Courts, Judges and Magistrates referred to in sub-section (1) are—

(a) any such Court, Judge or Magistrate exercising jurisdiction within an area in India to which this Code does not extend, as the Central Government may, by notification, specify in this behalf;

(b) any Court, Judge or Magistrate exercising jurisdiction in any such country or place outside India, as the Central Government may, bynotification, specify in this behalf, and having authority, under the law in force in that country or place, to issue commissions for the examination of witnesses in relation to criminal matters.

Adjournment of proceeding **22.7**

In every case in which a commission is issued under Section 284^ the inquiry, trial or other proceeding may be adjourned for a specified time [13]

13. *See supra*, para. 22.2 for the contents of S. 284.

reasonably sufficient for the execution and return of the commission. [S. 2.89]

B. Special circumstances permitting unassayed evidence

There are two methods of testing evidence and ensuring that truth comes out in evidence. The first is by administration of oath and the other is cross-examination. These are the two most important safeguards against false testimony and unless evidence is given on oath and is tested by cross-examination, it is not legally admissible against the party affected.[14] However, these safeguards have been, to an extent, dispensed within the circumstances mentioned in Sections 290 to 291. The following paragraphs will deal with these matters.

22.8 Deposition of medical witness

The deposition of a civil surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under this chapter, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness. [S. 291(1)]

The court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such deponent as to the subject matter of his deposition. [S. 291(2)]

A new Section 291-A has been inserted by the Criminal Procedure Code (Amendment) Act, 2005 with effect from 23 June 2006. The section enacts:

Identification report of Magistrate

> (x) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:
>
> Provided that where such report contains a statement of any suspect or witness to which the provisions of Section 21, Section 32., Section 33, Section 155 or Section 157, as the case may be, of the Indian Evidence Act, 1872 {1 of 1872}, apply, such statement shall not be used under this sub-section except in accordance with the provisions of those sections.
>
> (2} The court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report.

Sections 292 and 293 also came to be amended by Code of Criminal Procedure (Amendment) Act, 2005[15] and Criminal Law (Amendment) Act, 2005. The section emerging from the amendments reads as follows:

14. *Suleman* v. *State of Gujarat*, (1961} 2 Cri Lj 78: AIR 1961 Guj 120, 123.
15. S. 25, Code of Criminal Procedure {Amendment) Act, 2005 (25 of 2005) which amended S. 292, CrPC, 1973 has been omitted by S. 7, Criminal

Any document purporting to be a report under the hand of any such officer of any Mint, or of any Note Printing Press, or of any Security Printing Press (including the officer of the Controller of Stamps and Stationery) or of any Forensic Department or division of Forensic Science Laboratory or any Government Examiner of Questioned Documents, or any State Examiner of Questioned Documents, as the case may be, as the Central Government may. by notification, specify in this behalf, upon any matter or thing duly submitted to him for examination and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.

The "gazetted officer" mentioned in the earlier version has now been specified. The amendment effected to Section 2.92(3) also specifies the officers belonging to the Mint, Note Printing Press or Security Press who could give permission to give evidence on information derived from any unpublished official records to disclose the particulars of test applied by him in the course of examination of the matter.

The deposition of a medical witness, taken and signed in the presence of the accused and attested by a Magistrate, can be given as evidence in any inquiry or trial even without calling him as a witness. It may, however, be noted that the section confines itself to expert evidence given by a medical witness as such. The section does not apply to the evidence relating to facts tendered by a person who also happens to be a medical man.[16 17]

Evidence of officers of the mint **22** S

In this regard Section 292 provides as follows:

292. {1} Any document purporting to be a report under the hand of any such *Evidence of officers of* [17][officer of the Mint or of any Note Printing Press or of any Security Printing *the Mint* Press (including the officer of the Controller of Stamps and Stationery) or of any Forensic Department or Division of Forensic Science Laboratory or any Government Examiner of Questioned Documents or any State Examiner of Questioned Documents, as the case may be,] as the Central Government may, by notification, specify in this behalf, upon any matter or thing duly submitted to him for examination and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness. (2) The Court may, if it thinks fit, summon and examine any such officer as to the subject- matter of his report: Provided that no such officer shall be summoned to produce any records on which the report is based.

{3) Without prejudice to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), no such officer shall, [18] [except with the

2,006) (w.e.f 16-4-2006).

16. *Warts Khan v. Emperor.* (3:941} 42 Cri Lj 483: AIR 1940 Oudh 209, 211.
17. *Subs, by* Act 2 of 2006, S. ; (w.e.f. 16-4-2006).

IS. *Ibid.*

permission of the General Manager or any officer in charge of any Mint or of any Note Printing Press or of any Security Printing Press or of any Forensic Department or any officer in charge of the Forensic Science Laboratory or of the Government Examiner of Questioned Documents Organisation or of the State Examiner of Questioned Documents Organisation, as the case may be,] be permitted—

(a) to give any evidence derived from any unpublished official records on which the report is based; or

{b) to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

In a number of cases in which the genuineness of a document is assailed, the date of the manufacture of the sheet of paper on which the document is written or the date of the manufacture of stamp used becomes a vital issue. While the officers concerned tender the requisite information after having the documents examined, they cannot disclose details of their line of investigation or the distinctive marks on the paper or stamps issued in a particular year, as that might result in a large scale forgery of commercial documents and counterfeiting of stamps.[19] It was, therefore, felt necessary to provide that if any such expert is called to court, he should not be compelled to disclose any confidential information on which the report might be based, the reason being that the disclosure of such information may facilitate the forging of currency notes or revenue stamps. The same consideration applies to the officers of the mint.[20] The proviso to Section 2.92(2) further provides that no such officer shall be summoned to produce any records on which the report is based. The reason is obvious. Bringing the records of the various departments in courts is inconvenient, and may even involve the risk of the valuable records being stolen or otherwise lost or tampered with.[21 * 23]

It may be noted that the section applies only to such gazetted officers as the Central Government may, by notification in the Official Gazette, specify. The object is that the privilege conferred by the section should apply to high officers who could be trusted to make a report with a due sense of responsibility.[22 23] The section undoubtedly affects, to an extent, the normal legitimate rights of the individual accused person; however, the section can be justified on the ground that the security of the State and its financial stability are primary and overriding considerations which must prevail over the rights of the individual.[2']

19. 2.5 th Report
20. 41st Report,
21. 25th Report o f the Law
22. *Ibid,* p. 6, para. 13.
23. *Ibid*, pp- *6-7*, para. 13.

Sections 123 and 124, Evidence Act referred to above relate to restrictions on giving evidence as to the affairs of State and official communications.

Report of certain government scientific experts

22.10

Reports of certain Government scientific experts

Section 293 reads as follows:

293. (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:—

(1a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief[24] [25] [26][Controller] of Explosives;

ic) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director [25] [26]j, Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

f} the Serologist to the Government.

[26][(g} any other Government Scientific Expert specified by notification, by the Central Government for this purpose.]

The section is intended to ensure that an expert covered by this provision is not to be summoned for oral evidence as a matter of routine at the instance of a party; the court has a discretion in the matter and may summon the witness only if it is satisfied that it is expedient to do so for the ends of justice. When oral evidence is to be given with reference to the report of an expert, an officer subordinate to the expert, who is conversant with the facts of the case, may be deputed unless the court expressly requires the presence of the expert himself.[27]

The words "duly submitted" in Section 293(1} include within their ambit the mode and manner of the submission of the sample and its receipt by the Scientific Expert. Consequently, the report with regard to the manner of submission of the sample for examination and its condition

24. *Subs,* for "Inspector'" by Act 25 of 2,005, S. 26(a) (w.e.f. 2,3-6-2006}.
25. *Ins.* by CrPC (Amendment) Act, 1978. S. 21.
26. *Added* by Act 25 of 2005, S. *26{b)* (w.e.f. 23-6-2006).
27. Notes on els. 298-306.

would come squarely within the scope of Section 2,934[s] Therefore, it is not necessary for the prosecution to examine any or every official concerned within the office of the Chemical Examiner (or other scientific expert) with regard to the safe custody of the sample therein, and the prosecution's failure to do so would not introduce any infirmity to its case.[28] [29]

The section is open to criticism as the accused person is put in peril of capital or any punishment on a written report not given on oath and untested by cross-examination.[28] [29] [30]

If a report of the Chemical Examiner does not contain data of the tests or experiments performed by him and the reasons for his opinion, the objection can only be to the weight attached to the report. Its admissibility in evidence cannot be challenged.[31] [32] [33] The probative value of the report depends upon several circumstances, such as the data available, the method of analysis, the fullness of the conclusion and speaking generally, the vulnerability to which the examiner's premise is subject.[32] [33] It will not be inappropriate to mention here the critical observations of the Allahabad High Court. The court said:

> Whatever may be said of the wisdom of this enactment—contrary as it is to the accumulated legal experience of centuries of what is necessary for the protection of accused person—nothing is more certain than that [the] section..., fortunately for accused person, says nothing as to the weight to be attached to the report.[35]

Generally speaking, there is nothing wrong in taking the report without examining the examiner; however, where the reports of the Chemical Analyser and the Serologist which are produced by the prosecution are conflicting in their substance, the mere production of the reports does not prove anything which can weigh against the accused person.[34]

According to the Supreme Court, the reason why the report of the Director of the Finger Print Bureau is treated as evidence without examining the persons giving the report is that the comparison and identification of fingerprints has now developed into a science and the results derived therefrom have reached a stage of exactitude. As long as the report shows that the opinion was based on observations which lead to a conclusion that

28. *Bbagwan Dass* v. *State of*
29. *Ibid;* see also, *State of Punjab*
30. *See* observations of Young j in
31. *State* v. *Ramsingh,* (1963) 1 Cri Lj 567: AIR 1963 Bom 68, *jc-;*
32. *State* v. *Bhausa,* (2962) 2 Cri Lj 466: AIR 1962
33. *Emperor* y. *Happu,* AIR 2933
34. *Tulsiram Kanu* v. *State,* 1954

the opinion can be accepted, but should there be any doubt it can always be decided by the calling of the person making the report.[35] It has been held by the Supreme Court that the term "Director" in Section 293(4)^) includes "Joint Director".[36]

It has been pointed out by the Supreme Court that the report of the Chemical Examiner by itself is not crucial. The only protection given to it is that it does not require any formal proof. It is open to the court, if it so desires, to call the Chemical Examiner and examine him.[37]

In a murder case, the Chemical Examiner's report coupled with the opinion of the doctor based on it as to the cause of death was held sufficient to prove death by poisoning.[38]

No formal proof of certain documents

22.11

Where the genuineness of any document is not disputed by the parties, such document should be allowed to be read in evidence without the formal proof of the signature of the person to whom it purports to be signed. This has been provided by Section 2.94 which reads as follows:

No form.al proof of certain documents

> 294. (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.
>
> (2} The list of documents shall be in such form as may be prescribed by the State Government.
>
> (3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:
>
> Provided that the Court may, in its discretion, require such signature to be proved.

The section is useful for curtailing avoidable delay and expenditure in the conduct of the criminal proceedings.

The word "any" appearing before the word "document" in Section 294(1) means an indefinite number and makes that provision applicable to all documents filed by the prosecution or the accused irrespective of their nature and character.[39] For attracting Section 294 it is

35. *H.F. Admn.* v. *Om Prakash.* (1972) x SCC 249: 1972 SCC (Cri) 88,

36. *Ammini* v. *State of Kerala,* (1998) 2 SCC 301:

37. *Bhupinder Singh* v. *State of Punjab,* (1988) 3 SCC 5x3: 1988 SCC

38. *Ibid.*

39. *Saddiq* v. *State,* 1981 Cri LJ 379, 380 (All) (FB); *see also,*

irrelevant whether the documents admitted to be genuine are primary or secondary or substantive or corroborative.[40]

If the prosecution or the accused does not dispute the genuineness of document filed by the opposite party under Section 294(1), it amounts to an admission that the entire document is true and correct. It means that the document has been signed by the person by whom it purports to be signed. It also implies the admission as to the correctness of the contents of the document. Such a document may be read in evidence under Section 294(3). The phrase "read in evidence" means as substantive evidence, which is the evidence adduced to prove a fact in issue as opposed to the evidence used to discredit a witness or to corroborate his testimony.[41] Therefore an injury report filed by the prosecution under Section 294(1} whose genuineness is not disputed by the accused may be read as substantive evidence under Section $^{2}94(_{3}^{)}$.[42]

In a case the trial court accepted the injury reports prepared by the doctor under Section 294. The doctor was not examined. The Patna High Court rejected the plea to treat these reports as evidence under Section 294. The court ruled that these reports could not substitute direct evidence of the doctor. Instead, they could be used to corroborate or contradict the doctor.[43]

22.12 Affidavits in proof of certain matters

To speed up the trial without affecting its fairness, it has been provided that evidence of a formal character may be adduced by filing an affidavit of the witness. The relevant provisions in this connection are as follows:

(a) *Affidavit in proof of conduct of public servants*.—According to Section 295, when any application is made to any court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servants, the applicant may give evidence of the facts alleged in the application by affidavit, and the court may, if it thinks fit, order that evidence relating to such facts be so given. [S. 2.95]

{b) Evidence of forma! character on affidavit.—The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code. [S. 296(1)]

40. *Sk.*
41. ***Saddiq*** v. ***State***
42. ***ibid,***
43. *Ram*

The court may. if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in the affidavit. [S. 296(a)]

The object of providing for Section 296 is to help the court to gain time and cost besides relieving the witness of his troubles, when all that the said witness has to say in court relates only to some formal points.[44]

Besides the two categories of evidence as mentioned in Sections 295 and 296, no other evidence can be adduced by affidavit.[45] [46] [47]

(c) Affidavits how made.—Section 297 provides as follows:

297. (1) Affidavits to be used before any Court under this Code may be sworn or affirmed before—

Authorities before whom affidavits may be sworn

{a) [46][**any** judge or any Judicial or Executive Magistrate, or]

(b) any Commissioner of Oaths appointed by a High Court or Court of Session, or

{c) any notary appointed under the Notaries Act, 1952 (53 of 1952).

(2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall dearly state the grounds of such belief.

(3) The Court may order **any** scandalous and irrelevant matter in the affidavit to be struck out or amended.

An affidavit is a written declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before an officer having authority to administer such oath.

Section 297(1) mentions the authorities before whom the affidavit may be sworn or affirmed.

Section 297(2} states the matters to which the affidavits are to be confined and the mode in which they are to be sworn or affirmed. In a case where it is not stated in the affidavit as to which portion is sworn on personal know-ledge or on the information received from record or from any other source, and where the person before whom the affidavit has been presented and who has verified it has not certified the fact of swearing of affidavit before him and the hour of swearing nor has it been certified that the affidavit was read out and explained to the deponent and that he understood the contents thereof, the affidavit cannot be construed to be an

44. State of Punjab v. ***Naib Din,*** (2.001) 8 SCC 578: 2,002

45.

M

46. ***Subs,*** by Act 45 of 1978, S. 22 for "any judge or

47. ***Pitamber*** v. ***State.*** 1973 Cri Lj 948, 949-50 (All).

The affidavits that are required to be filed in the court under the Code have to be governed by the provisions of Section 297 thereof.[48 49]

22.13 Proof of previous conviction or acquittal

Section 298 which provides how a previous conviction or acquittal can be proved, is as mentioned below:

Previous conviction or acquittal how

298. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,—

(a) by an extract certified under the hand of the officer having the cusrody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

22.14 Proof of previous conviction may become necessary when the question of awarding enhanced punishment arises, as for instance in cases where Section 75, Penal Code, i8bo becomes applicable. The modes of proof provided by Section 298 above are in addition to other modes provided in any other law.

Record of evidence in absence of

Record of evidence in the absence of the accused

According to the normal rule provided in Section 273® all evidence is to be taken in the presence of the accused. Because of special circumstances, Section 299 provides an exception to this rule. Section 299 is as follows:

299. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try[48 49 50][or commit for trial,] such person for the offence complained of may, in his absence, examine the witnesses (if any} produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence

hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or.beyond the limits of India,

The situations in which evidence recorded under sub-sections (1) and (2) of Section 299 can be later utilised, are described in different terms in each sub-section, but it appears that the distinction is deliberate. Subsection (2) is meant for a case where the offender is unknown and the offence is a serious

sl

one.

The evidence recorded in the case of the trial of a co-accused of the absconder or other persons cannot by ex post facto operation be treated as evidence recorded under Section 299 for the purpose of utilising it at the trial of the absconder when he is apprehended and tried subsequently. The prosecution should move the court and prove by evidence before the recording of evidence against the co-accused that certain persons are absconding and that it is not possible to apprehend them. It is for the court thereafter to give directions that the evidence about to be taken is being taken for the purpose of being used, if necessary, against the absconder [51] [52]

51, ***See.,*** 41st Report, p, 328, para, 41.8,
52.

Chapter 23

Judgment

The object and scope of the chapter 23.1

The main functions of a criminal court are twofold: i) to decide as to the guilt or innocence of the accused person tried before it; and 2) if such person is found guilty of any offence, to determine as to the appropriate punishment or other method of dealing with him. In the earlier chapters the different types of trials were considered.[1] In every trial, irrespective of its nature, the court will have to give a judgment in the case at the conclusion of the trial. The judgment is the final decision of the court, given with reasons, on the question of the guilt or innocence of the accused person. It also includes the court's decision as to the punishment the guilty person has to suffer, or as to the conditions subject to which the offender is to be released without being punished as such.

The present chapter proposes to deal elaborately with different aspects of judgment. For the sake of clarity and better analysis of the subject-matter, the chapter has been divided into six parts. Part A deals with form and contents of judgment; Part B considers the post-conviction orders; Part C discusses the decisions as to punishment; Part D mentions the precautionary and preventive orders; Part E considers the provisions relating to compensation and costs; and lastly, Part F deals with the pronouncement of the judgment and other ancillary matters.

A. Form and contents of judgment Language and contents of judgment

(i) Every judgment shall be written in the language of the court. [S. 354(1) *{a)]* The language of the court is determined by the State Government.[2] 23.2

1. ***See supra,*** Chaps.
2. ***See supra,*** S. 272,

The word "shall" in the above provision indicates that it is mandatory; however, the provision in Section 364[2] for the translation of the judgment—"where the original is recorded in a language different from that of the court", would suggest that the judgment need not necessarily be written in the language of the court. Under the Criminal Procedure Code, 1898, judgments were allowed to be written and were in fact written in English; now under the above provision in the new- Code, though it is obligatory to write judgments in the court language, the old practice of writing judgments in English *almost* continues to remain unaffected.

(2) Every judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision. [S. 354(1)(£>)]

Usually the judgment in a criminal case should commence with a statement of facts in respect of which the accused person is charged. The judgment should indicate a careful analysis and appraisement of the evidence while reaching the conclusions regarding the proof of facts.[3,4] It is the bounden duty of the Magistrate to produce judgment in a case coming before him which is self-contained and which would show that he has intelligently applied his mind to the facts of the case and the evidence led therein by the respective parties and a criticism of this evidence justifying the conclusion to which the Magistrate feels persuaded to come.[5] The Supreme Court has also from time to time directed that all orders passed by the courts should be speaking orders giving reasons for the decision after noting the point at issue.[6] This rule applies to judgments on grant of bail also.[7]

3. ***See infra,*** para. 2.3.19; similarly ***see,*** S. 363(2) where the court is required to give to the accused "a translation ... in die language of the court". This shows that despite the mandatory provision in S. 3 the judgment can be written in a language other than the court language.
4. ***Ramhtt*** v. ***Emperor,*** (1934) 35 Cri LJ 919, 925 (All); ***Panchu Sheikh*** v. ***Emperor,*** (1944) 45 Cri LJ 170, ,,,,: AIR 1943 Cal 612, 613.
5. ***Budbia*** v. ***Chhoteial,*** 1966 Cri LJ 585; AIR 1966 Raj 122, 125.
6. ***Niranjan Mondal*** v. ***State,*** 1978 Cri Lj 636, 637 (Cal); see also, ***State of Punjab*** v. ***jagdev Singh Tahvandi,*** (1984) 1 SCO 596: 1984 SCC (Cri) 135: 1984 Cri LJ 177; ***Raghunath Laxman Makadwada*** v. ***State of Maharashtra,*** (1986} 2 SCC 90: 1986 SCC (Cri) 108: 1986 Cri LJ 858 and ***Jawahar Lai Singh*** v. ***Naresh Singh,*** (1987} 2 SCC 222: 1987 SCC (Cri) 347; ***Ram Karan*** v. ***State of Rajasthan,*** 1990 Supp SCC 604: 1991 SCC (Cri) 162; ***State (Delhi A.dmn.)*** v. ***Shiv Kumar,*** 1990 Supp SCC 673: 1991 SCC (Cri) 158; ***State of U.P.*** v. ***Jagdish Singh,*** 1990 Supp SCC 150: 1990 SCC (Cri) 636; ***Badri*** v. ***State of Rajasthan,*** 1995 Supp (3) SCC 521: 1995 SCC (Cri) 990; ***Jshvarbhai Euljibhai Patni*** v. ***State of Gujarat,*** (1995) 1 SCC 178: 1995 SCC (Cri) 222; ***Vijayendra Kumar*** v. ***State of Bihar,*** (2005) 9 SCC 252: (2006} r SCC (Cri) 734.
7. ***Puran*** v. ***Rambilas,*** {2001) 6 SCC 358: 2001 SCC (Cri) 1124; ***Ram Govind Upadhyay*** v. ***Sudarshan Singh,*** (2002) 3 SCC 598: 2002 SCC (Cri) 688; ***Omar Usman Chamadia*** v. ***A.bdtd,*** (2004) 13 SCC 234: 2005 SCC (Cri) 157: 2004 Cri Lj 1364; ***Kalyan Chandra Sarkar*** v. ***Rajesh Ranjan,*** (2004) 7 SCC 52S; 2004 SCC (Cri) 1977; ***Cbaman Lai v. State of U.P.,*** (2004) 7 SCC 525: 2004 SCC (Cri) 1974; ***A.mvari Begum*** v.

A criminal trial concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts.[8] It is the plain and bounden duty of the court to analyse and discuss the evidence in its judgment. Each piece of evidence must be considered and assessed on its own merits and then accepted or rejected.[9] The weight to be attached to the testimony of a witness depends in a large measure upon various situations. The respectability and the veracity of a witness is not necessarily dependent on his status in life.[10] It is well settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses become unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses.[11] If on the face of it, the evidence is in consonance with probability and consistent with ordinary human conduct that fits in with the other evidence in the case, there is no reason to discard such evidence. But if it is otherwise and the evidence is such that it is contrary to natural human conduct and thus artificial, however, vehement or voluminous it might be, hardly can it be acceptable failing as it does the acid test.[12] It may be noted that the prosecution is to prove its case and the falsity of defence cannot establish, it. If the other circumstances point unfailingly to the guilt of the accused, the falsity of defence can he considered as an additional link. The prosecution case cannot be said to be proved as a result of failure of an accused person to prove his plea of alibi.[13]

The Supreme Court has pointed out that while assessing the evidence given by a witness the Magistrate or the judge should express his opinion in temperate language usually associated with and reflecting the impersonal dignity* of judicial restraint.[14] When the court comes to the

8. ***State of Punjab*** v. ***Jagir Singh,*** (1974) 3 SCC 277: 1973 SCC (Cri) 8S6, 894-95:
9. ***State of U.P.*** v. ***Jageshuara,*** {1983} 2 ***SCC*** 305: 1985 SCC (Cri) 417, 429: 1985 Cri Lj 686; ***see.*** observations in ***Biswanath Ghosh*** v. ***State of W.B.,*** (1987} 1 SCC 55: 1987
10. ***Hazari Lai*** v. ***State (Delhi Admn.},*** (1980) 2 SCC 390: 198c SCC (Cri) 45S. 464:
11. ***SurajMai*** v. ***State (Delhi Admn,),*** {1979) 4 SCC 725: 1980 SCC (Cri) 159, 160: 1973
12. ***Brajabandhu Naik***v. ***State,*** 1975 Cri Lj 1933., 1937 (Ori).
13. ***Anam Pradhan*** v. ***State,*** 1982 Cri Lj 15S5, 1590 (Ori).
14. *Nageshwar Sri Krishna Ghobe* v. *State of Maharashtra*, {1973) 4 SCC 23: 1973 SCC (Cri) 664, 672:
1973 Cri Lj 235, 241; see also, ***State of U.P.*** v. ***Moha. Haim,*** {1964) 1 Cri Lj 549:

conclusion that it has no jurisdiction to any particular type of proceeding, it should desist from giving a finding on a particular disputable point.[15]

In cases depending upon circumstantial evidence there is always the danger that conjecture or suspicion may take the place of legal proof. Therefore, it would be well to keep in mind the fundamental rule relating to the proof of guilt based on circumstantial evidence which has been settled by a long line of decisions of the Supreme Court. In such cases, according to the fundamental rule, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.[16]

According to Section 387, the rules contained in Sections 353 to 365 as to the judgment of a criminal court of original jurisdiction shall apply to the judgment m appeal of a Court of Session or Chief Judicial Magistrate. Therefore, even if the appellant and his counsel were absent on the date of hearing of the appeal, it is necessary for the appellate court to discuss the evidence led in support of the prosecution case and to give reasons for accepting or rejecting it in view of the abovementioned Section 354(1) (h).[17] It is relevant to note here that an appeal will not be refused to be heard in the absence of appellant or his counsel. The appellate court in such circumstance appoint a counsel and hear the appeal.[18] It may also be noted that when the appellate court agrees with the view of the trial court on the evidence, it is not necessary for the appellate court to repeat the narration of evidence or to reiterate the reasons given by the trial court; expression of general agreement with the reasons given by the trial court will ordinarily suffice.[19]

(3) Every judgment shall specify the offence (if any) of which, and the section of the Penal Code, i860 (IPC) or other law under which,

15. *Fakirbhal Chhaganlal* v. *Ran;it Raiilal,* 1982. Cri LJ 2161, 2262 **(Guj).**

16. *S.P. Bhatnagar v. State of Maharashtra,* (1979) 1 SCC 535: r979 SCC (Cri) 323, 338: 1979 Cri LJ 566, 577;

see also, *Hanumant Govind Nargundkar* v. *State of M.P.,* 1953 Cri LJ 129: AIR 1952 SC 343; *Paluinder Kaur* v. *State of'Punjab,*

17. *Naresh Kumar* v. *State o fU. P* 1981 Cri LJ 37S, 379 (All).

18. *Siaram Yadau* v. *State of Bihar,* 1989 Cri LJ 1602 (Pat), discussing Supreme Court decisions in

Shyam Deo Pandeyv. State of Bihar, (1971} 1 SCC 855: 1971 **SCC**

19. *State of Karnataka* v. *Piemareddy,* (1981) 2 SCC 185: 1981 SCC (Cri) 395, 399: 1981 Cri Lj 1019; see

the accused is convicted and the punishment to which he is sentenced. [S. 354(i)(c)]

When the conviction is under the IPC and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the court shall distinctly express the same, and pass judgment in the alternative. [S. 354(2)]

The various considerations in specifying the punishment for the offender would be discussed in detail later.[20]

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty. [S. 354(i)(d)] However, if the judgment of acquittal is given on the ground that the accused was insane at the time at which he is alleged to have committed the offence charged, the accused shall not be set at liberty by the judgment of acquittal. For such cases special provisions have been made in the Code.

We have already discussed the special provisions in respect of cases where the accused person is incapable of making his defence because of unsoundness of mind at the time of inquiry or trial.[21] But when the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act, which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, Section 333 requires the Magistrate to proceed with the case, and, if the accused ought to be tried by a Court of Session, to commit him for trial before the Court of Session.

Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not. [S. 334] Section 335 then provides for the detention in safe custody of persons acquitted on such ground. Section 335 is as follows:

335. (1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence,—

(a) order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, or

(b) order such person to be delivered to any relative or friend of such person.

Person acquitted on such ground to he detained in safe custody

20. *See*

21. ***See***

(2) No order for the detention of the accused in a lunatic asylum shall be made under clause *(a)* of sub-section (i) otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

(3} No order for the delivery of the accused to a relative or friend shall be made under clause {b} of sub-section (1), except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct.

(4) The Magistrate or Court shall report to the State Government the action taken under sub-section (i).

The primary object of the detention order under Section 335 is rehabilitation of the accused (now acquitted) and to prevent any trouble if he should relapse into insanity.[22]

Sections 336, 33S and 339 are related sections which deal with the powers of officers to discharge persons detained as above and the procedure to be followed when such persons are declared fit to be released. These sections have already been discussed in another context in para. 14.8 and the same need not be reproduced here once again.

233 Judgments in abridged forms

Instead of recording the judgments in usual manner provided by Section 354 as mentioned in para. 23.2 above, the judgments given by the Metropolitan Magistrates or in summary trials are required to be recorded in specified abridged forms.

(1) A Metropolitan Magistrate shall record the following particulars while giving a judgment.

{a) the serial number of the case;

(b) the date of the commission of the offence;

(e) the name of complainant (if any);

(d) the name of the accused persons, and his parentage and residence;

(e) the offence complained of or proved;

(/) the plea of the accused and his examination (if **any**);

(g) the final order;

(h) the date of such order;

(i) in all cases in which an appeal lies from the final order either under Section 373 or under Section 374(3), a brief statement of the reasons for the decision. [S. 355]

22. *See,* 41 SE Report, p. 2,92, para. 34-5.

Section 373 referred to above in clause *{i)* deals with appeals from orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour; and Section 374(3) inter alia deals with appeals by persons convicted on trial held by a Metropolitan Magistrate. In other words, according to clause *(i)* above, a Metropolitan Magistrate is required to give a brief statement of the reasons for his decision in all cases in which an appeal lies.

(a) judgments in summary trials are not required to be recorded in the manner mentioned in Section 354 and discussed in para 23.1 above. The record and judgment in summary trials must be in the specified abridged form as provided by Sections 263 to 265. These sections have already been discussed in paras 21.15, [211]6 and 21.17 snd the same need not be repeated here.

B. POST-CONVICTION ORDERS IN LIEU OF PUNISHMENT

Post-conviction dilemma

23.4

As observed by the Supreme Court, guilt once established, the punitive dilemma begins,[23] [24] [25] The Code provides that in every trial when the accused is found guilty and convicted, the court *shall* proceed to pass sentence on him.[23] [24] This mandatory rule has two exceptions of which one is rather technical or formal in nature. The exceptions are: 1) In trials of warrant cases and summons cases, whenever a Magistrate is of opinion, after hearing the evidence, that the accused is guilty and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, he may record the opinion and submit his proceedings to the Chief judicial Magistrate. The Chief judicial Magistrate then shall proceed to pass such judgment, sentence or order in the case as he thinks fit.[25] This is not really an exception because the provision only enables the Magistrate to get the post-conviction orders passed by a court of wider competence and authority. 2) In cases where the court considers it desirable to proceed in accordance with the provisions of Section 360 the court may, having regard to the age, character, antecedents or physical or mental condition of the offender and to the circumstances in which the offence was committed, instead of sentencing the accused person to any punishment, release him after admonition or on probation of good conduct. Section 360 would be considered later in para. 23.5. According to Section 19, Probation of Offenders Act, 1958, [read with S. 8(1}, General Clauses Act, 1897] Section 360 of the Code would, cease to apply to the States or parts thereof In which that Act is

23. *Ediga knamma* v. *State of A.P.,* (1974) 4 $CC 443: 1974 SCC (Cri) 479, 485: 1974 Cri Lj 683/686.
24. *See supra.* Ss. £35(2.}. 2.48(2,), 2,55(2,), paras. 19.7(6), *z0.n(a}, 21.6(b).*
25. *See supra,* note 13, and *supra,* S. 325, para. *jA.*[A]*,{a)[j).*

brought into force.[26] The Probation of Offenders Act is much wider in its sweep with its special emphasis on the reformation and rehabilitation of the offenders. Notwithstanding anything contained in any other law for the time being in force, the Act enables the court to release offenders after admonition or on probation of good conduct under certain circumstances.

It may be noted that in view of Sections iS and 19, Probation of Offenders Act, 1958 neither the provisions of that Act, nor of Section 360 of the Code would apply to the cases under Section 5(2), Prevention of the Corruption Act, 1947.[27]

Thus, when the court finds an accused guilty it has got rhe discretion either to punish the offender or to release him after admonition or on probation of good conduct under Section 360 or under Sections 3 and 4, Probation of Offenders Act. The question Is what considerations should weigh with the court and how the court is to exercise the discretion. The discretion, to an extent, is canalised by the provisions of Section 360 and Section 361, Criminal Procedure Code, 1973 (CrPC) and the Probation of Offenders Act.

23,5 Guidelines for the exercise of the discretion not to punish

There has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life.[28] On the other hand, there are occasions when an offender is so antisocial that his immediate and sometimes prolonged confinement is the best assurance of society's protection. In such cases, the consideration of rehabilitation has to give way, because of the paramount need for rhe protection of society.[29] In such cases the kindly application of the probation principle is negatived by the imperatives of social defence and the improbabilities of moral pros- elytisation.[30] These conflicting demands make the exercise of the discretion, to punish or not to punish, exceedingly difficult. Some statutory guidelines in this connection have been given in Sections 360, 361 CrPC and the Probation of Offenders Act.

{a} Circumstances in which an offender may be released on probation of good conduct or after admonition.—Section 360 provides as follows:

26. *Pushkar Raj v. State of Punjab,* 1981 Cri Lj 1910, 1911 (P&H'i; *State of Punjab* v. *Harbans Lai,* 1983 Cr; LJ 13 (PScH); *State of Kerala* v. *Chellappan George,* 1983 Cri Lj 1780: 1983 KLT 811; see also, *Daljit Singh* v. *State of Punjab,* (2.006} 6 SCC 159: (2006) 3 SCC

27. *Gurbaehan Singh* v. *State of Punjab,* 1980 Cri Lj 417, 421

2$. *See,* Statement of Objects and Reasons appended to the Probation of

29. *See,* the observations of the Law Commission of India in its 47th Report on "The Trial and

30. *See,* observations of Krishna Iyer j in *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange,* (1974)

Order to release on p rob a lion of good conduct or after admonition

360. (1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period {not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where an)[7] first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in *which* a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of i860) punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition,

{4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

{5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:

Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

{6) The provisions of Sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under subsection (r), shall be satisfied that an offender or his surety {if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 {2.0 of 1958), or the Children Act, i960 *(60* of i960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

Sections 121, 124 and 373 referred to in sub-section (6) above respectively deal with power to reject sureties, security for unexpired period of bond, and appeal from orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour.

Offenders with any previous conviction or those found guilty of any offence punishable with death or imprisonment for life are totally beyond the purview of the section. Sub-section (i) gives discretion to the court to release an offender on probation of good conduct provided the offender is *i)* a woman, or *u)* a person below 2.1 years of age, or *Hi)* a male person of zr years of age or above who is not guilty of an offence punishable with more than seven years' imprisonment. From this it will be clear that the section tries to reform the criminals by treating them leniently only in those cases where there is no serious danger or threat to the protection of society. Again, the court is to use the discretion given in this respect judicially and having regard to the age, character and antecedents of the offender, and to the circumstances in which the offence was committed.[31] The section is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals, who may lead them further along the path of crime, and to help even men of more mature years, who for the first time may have committed crimes through ignorance, or inadvertence or the bad influence of others and who, but for such lapses, might be expected to be good citizens.[32] It is

31. *Mohd. Han't/* v. *Emperor,* (1942) 43 Cri LJ 754: AIR 1942 Bom 215; *Emperor* v. *Dukalba,* (1933) 34 Cri LJ 271 (Nag JCC); *Public Prosecutor* v. *Madathi,* (1942} 43 Cri Lj 671: AIR 1942 Mad 415(2); *see also,* observations in *DUbag Singh* v. *State of Punjab,* {1979) 2 SCC 103: 1979 SCC (Cri)

32. *See, Jamal Hat]* v. *State ofTripura, (2006)* 9 SCC 757.

not intended that this section should be applied to experienced men of the world who deliberately flout the law and commit offences.[33]

It is interesting to see how the courts in India have been applying Section 360 of the Code and the provisions of the Probation of Offenders Act. In *Ramji Missar* v. *State of Bihar*[34], while considering the question of extending the benefit of probation, it was held by a four-judge Bench of the Supreme Court that the question of the age of the person is relevant not for the purpose of determining his guilt but only for the purpose of the punishment which he should suffer for the offence of which he has been found, on the evidence, guilty. The object of the Probation of Offenders Act, 1958 was identified as to prevent the turning of youthful offenders into criminal by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. If this were borne in mind it would be clear that the age referred to by the opening words of Section 6(1) should be that when the court Is dealing with the offender, that being the point of time the court has to choose between the two alternatives which the Act in supersession of the normal penal law vests in it, *viz.*, sentence the offender to imprisonment or to apply to him the provisions of Section 6(1) of the Act. Another question was whether the age of the offender is to be reckoned as at the date of the judgment of the trial judge or is it the date when the accused is, for the first time, in a position to claim the benefit of Section 6. The court opined that on the terms of the section, on grounds of logic as well as on the theory that the order passed by an appellate court is the correct order which the trial court should have passed, the crucial date must be that upon which the trial court had to deal with the offender. The courts mentioned in Section 6(1} are held to include appellate and revisional courts. They are empowered to exercise jurisdiction conferred on courts not only under Sections 3 and 4 but also under Section 6, Probation of Offenders Act, 1958. The negligent driving of a scooter leading to the death of an innocent person made the Punjab and Haryana High Court to refuse to give the benefit of Section 360 to the accused.[35] [36] [37] Whereas the lapse of more than 17 years after the murder did not move the Gauhati High Court to give the benefit of probation to the accused who though got married and had children by the time of conviction, was responsible for the loss of husband of a young girl.[36] [37] However, the delay in trial depriving the accused of his right to speedy trial came to be considered by the Punjab and Haryana High Court for giving probation to the accused.[3/] The Patna High Court

33. B. *Titus, re.* (1942) 43 Cri Lj 3: AIR 1941 Mad 720, 723-24; *Ibrahim* v. *State*, 1974 Cri Lj 993
34. AIR 1963 SC 1088.
35. *Kuhuant Singh* v. *State of Punjab*, 1997 Cri LJ 2055 (P&H).
36. *State of Tripura* v. *Swap an Dey*, 1997 Cri Lj 2032 (Gau).
37. *Wakil Chand* v. *State of Punjab*, 1997 Cri Lj 1743 (P&H).

refused the benefit of Section 360 to an accused who took law into his hands.[38] In a serious case where the accused was convicted for attempt to commit rape under Section 376 read with Section 511 IPC the Supreme Court chose to give the accused the benefit of probation considering the punishment for attempt to commit rape as 10 years by taking life imprisonment to be for 20 years as per Section 57 IPC and then by virtue of Section 511 IPC taking its half, *i.e.* 10 years as the punishment for the offence under Section 376 read with Section 511 IPC.[39]

The words "death or imprisonment for life" ate to be interpreted disjunctively.[40]

Sub-section (3) is applicable only in respect of the specified offences and such other offences under the IPC which are not punishable with more than two years' imprisonment. Under this sub-section the court has got the discretion to release the offender after admonition instead of sentencing him to any punishment. While exercising the discretion the court should take into consideration the age, character, antecedents or physical or mental condition of the offender and the trivial nature of the offence or any extenuating circumstances under which the offence was committed.

If Section 360 is replaced by the Probation of Offenders Act, as seen above in para. 13.4, the offender can be still released after admonition or on probation of good conduct under Sections 3 and 4 of that Act which are wider in their scope rhan the provisions of Section 360. But here again the court will have to use discretion on the same lines as in cases under Section 360.

[b) Ordinarily no imprisonment to young offenders.—As seen in the preceding discussion, the court has full discretion to pass sentence on the convicted person or to release him under Section 360 of the Code or under the Probation of Offenders Act. This discretion, however, is to an extent restricted in favour of young offenders below 21 years of age. According to Section 6, Probation of Offenders Act, if the court finds such young offender guilty of an offence punishable with imprisonment (but not with imprisonment for life), it *shall* not sentence him to imprisonment without satisfying itself that it would not be desirable to release the offender under Section 3 or Section 4, Probation of Offenders Act; and if the court passes any sentence of imprisonment on such offender, it shall record its reasons for doing so.

(c) *Special directive to courts to use non-punitive measures.*—The discretion to sentence a convicted person to any punishment authorised by

38. *Bimai Bam* v. *State of Bihar,* 1997 Cri Lj 2846 (Pat).
39. *State of Haryana* v. *Prem Chand,* (1997) 7 SCC 756: 1997
40. *Emperor* v. *fanku* (1932.) 53 Cri Lj 844; AIR 1932. Nag 130; *Chetti* v. *State of M.P.,* 1959 Cri LJ 989: AIR T959 MP 2.91 -*Jogi Nahak* v. *State,* (1965) z Cri Lj 51: AIR 1965 Ori 106; *Som Math Pun* v. *State of Rajasthan,* (197') 1 SCC 630: 1971

law has been considerably narrowed down by Section 361. The section reads as follows:

Special reasons to be recorded in certain cases

> 361. Where in any case the Court could have dealt with,—
>
> *(a)* an accused person under Section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or *(b)* a youthful offender under the Children Act, 1960 (60 of 1960)[41], or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders,
>
> but has not done so, it shall record in its judgment the special reasons for not having done so.

The section clearly requires that the court shall normally deal with the offenders under Section 360 or under the Probation of Offenders Act, or in case of youthful offenders under laws for the treatment, training or rehabilitation of youthful offenders; in case the court chooses to do otherwise and to pass any sentence on the offender, that could be possible only for special reasons to be recorded in its judgment.

It is well settled that the provisions of Sections 360 and 361 are mandatory in nature,[42] and the mere prescription of the minimum sentence under Section 61(1)(c), Punjab Excise Act, 1914[43], or under Section 397 IPC[44], is no bar to the applicability of Sections 360 and 361 and the same is not a special reason for denying the benefit of probation to a person convicted thereunder.[45]

As observed earlier, Section 6, Probation of Offenders Act, restricts the discretion of the court only if it wants to sentence a young offender to imprisonment. The rationale of that provision has been explained by the Supreme Court in several of its decisions. It has been observed:

> The object of the Act is to prevent the conversion of youthful offenders into obdurate criminals as a result of their association with hardened criminals of mature age in case the youthful offenders are sentenced to undergo imprisonment in jail.[46]

Section 361, however, goes far beyond this objective. Even if the court wants to award a sentence of fine only, the section will discourage it by- making it obligatory for the court to record special reasons for not dealing with the offender under Section 360 or under the Probation of Offenders

41. At present the juvenile justice {Care and Protection of Children} Act, 2000 consolidating the law relating to juveniles in conflict with law
42. *Joginder Singh* v. *State of Punjab*, 1980 Cri Lj 1218, 1220 (P&H) (FB); see also, *Surendra Kumar* v. *State of Rajasthan*, {1979) 4 SCC 718:
43. *Jogindei' Singh* v. *State of Punjab*, 19S0 Cri Lj 1218, 1224 {P&H} (FB).
44. *Mohinder Singh* v. *State of H.P.*, 1980 Cri Lj (NOC) 127: ILR 1979 HP 470.
45. *Joginder Singh* v. *State of Punjab*, 1980 Cri Lj 1218, 1224 {P&H} (FB).
46. *Jugal Kishore Prasad* v. *State of Bihar*, {1972} 2 SCC 633: 1973 SCC {Cri) 48, 51: 1973

Act. Again, unlike Section 6, Probation of Offenders Act, Section 361 restricts the judicial discretion even in case of persons who are above 21 years of age and are quite grown-up. Further, Section 360 is applicable only in respect of first offenders; Section 4, Probation of Offenders Act *allows* the court to grant probation benefits to a person with previous conviction, but Section 361 *requires* the court to give probation benefits to an offender with previous conviction unless there are special reasons for not granting such benefits.

The "special reasons" contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. The personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors.[47]

The omission to record special reasons as required by Section 361 is an irregularity and may require the court of appeal or revision to set aside the sentence passed by the lower court if the irregularity has occasioned a failure of justice.[48] However, it is not yet clear under what circumstances the non-compliance with Section 361 would be considered to have resulted in failure of justice. Where the trial court has not given any opportunity to the accused to be heard on the question of sentence as required by Section 235(2)[49] [50] or Section 248(2)^ [51], and has also failed to comply with the requirements of Section 361, it would, it is submitted, be a case where the sentence will have to be set aside on the ground of failure of justice. It may be pertinent here to take note of the decision of the Supreme Court in *Santa Singh* v. *State of Punjab*[*1]. In that case it was observed by Fazal Ali J in his concurring judgment:

> Having regard to the object and the setting in which the new provision of Section 235(2) [and of Section 248(2)] was inserted in the 1973 Code there can be no doubt that it is one of the most fundamental parts of the criminal procedure and non-compliance thereof will ex facie vitiate the order [of sentence]. Even if it be regarded as an irregularity the prejudice caused to the accused

47. *Bisbnu Deo Shaia* v. *State of* W.B., {1979} 3 SCC 714: 1979 SCC (Cri) 817, 82,7-2.8: 1979 Cri Lj 841, 848; see also, *Satar Masiah v. State*,
48. *See supra*, S, 465, para. 7.9(c).
49. *See supra*, para.
50. *See supra*, para. 20.11(a).
51. {1976) 4 SCC 190: 1976 SCC (Cri) 546: 1976 Cri Lj 1875.

> would be inherent and implicit because of the infraction of the rules of natural justice which have been incorporated in this statutory provision, because the accused has been completely deprived of an opportunity to represent to the court regarding the proposed sentence and which manifestly results in a serious failure of justice.[52]

The benefit of probation can be denied only if there are special reasons which are required to be recorded by the court; and it has been held that it is the duty of the court to consider why compliance of Section 360 could be dispensed with even if the accused did not make any such request for his release on probation?[3]

In one case, the Allahabad High Court took a narrow view of Section 361. In that case the accused aged 35 and a first offender, was convicted and sentenced to one year's imprisonment under Section 25, Arms Act. No reasons were recorded by the trial court for not giving the benefits of Section 360 to the offender though that section was apparently applicable. The High Court found that as there was no mitigating factor in the circumstances in which the offence was committed, it was not a case which could be dealt with under Section 360. The court observed, "If in these circumstances the courts below did not give special reasons for not acting under Section 360, their judgments on the question of sentence cannot be treated as erroneous".[54] It is submitted that the narrow view taken by the High Court of Section 361 seems to be against the spirit of that section and is not likely to be sustained in future.

Exercise of judicial discretion in sentencing without adequate knowledge about the offender

23.6 A proper sentence is the amalgam of many factors such as the nature of the offence; the circumstances—extenuating or aggravating—of the offence; the prior criminal record, if any, of the offender; the age of the offender; the record of the offender as to employment; the background of the offender with reference to education, home life, sobriety and social adjustment; the emotional and mental condition of the offender; the prospects for the rehabilitation of the offender; the possibility of return of the offender to a normal life in the community; the possibility of treatment or training of the offender; the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence.[55]

52. *Ibid,* 555-56 [SCC (Cri)].
53. *Jai Parkasb* v. *State,* 1979 Cri LJ 1167, 1169-70 (Del).
54. *Khalil* v. *State,* 1976 Cri Lj 465, 466 (All).
55. *Santa Singh* v. *State of Punjab,* (1976) 4 SCC 190: 1976 SCC (Cri) 546, 550: 1976 Cri IJ 1575 *per* Bhagwati j.

Modem penology regards crime and criminal as equally material when the right sentence has to be picked out. However, in our processual system there is neither *comprehensive* provision nor *adequate* machinery for collection and presentation of the social and personal data of the culprit to the extent required in the verdict of the sentence.[36] While considering the question whether the offender instead of being punished, should be released after admonition or on probation of good conduct, the court has to take into consideration the character and the antecedents of the offender.

However, the court is more or less without any means to know the offender's individual make-up and his social background. The Supreme Court has rightly observed:

> The Court's approach has ar once to be socially informed and personalised. Unfortunately, the meaningful collection and presentation of the penological facts bearing on the background of the individual, the dimension of damage, the social milieu and what not—these are not provided in the Code and we have to make intelligent hunches on the basis of materials adduced to prove guilt.[56] [57]

The Code no doubt provides by Sections 2.35(2} and 248(2} that if the accused, in a trial before a Court of Session or in a trial of warrant case by a Magistrate, is found guilty and the court or the Magistrate does not proceed in accordance with the provisions of Section 360, the court or Magistrate shall hear the accused on the question of sentence and then pass sentence on him according to law. The word "hear" has been used to give an opportunity to the accused to place before the court or the Magistrate the various circumstances bearing on the sentence to be passed against him. The hearing contemplated by Sections 235(2) and 248(2) is not confined merely to hearing of oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side then to produce evidence for the purpose of establishing the same.[56] [57] [58] Of course, as cautioned by the Supreme Court, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings.[59] The non-compliance with

56. *Ediga Anamma* v. *State of A.?.,* (1974) 4 SCC 445: 1974 SCC (Cri) 479, 485: 1974 Cri Lj 685, 686; *see also,* observations in *Rajendra Prasad* v. *State of U.P.,* (1979) 3 SCC
57. *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange,* {1974) 1 SCC 167; 1974 SCC (Cri) [8]7. 99[:1]974 [Cri Lj] 3'3>
58. *Santa Singh* v. *State of Punjab,* (1976} 4 SCC 190: 1976 SCC (Cri) 546. 551; 1976 Cri Lj
59. *Ibid. See also supra,* paras. *19.71b}, zo.ri[a).*

the requirement of Section 235(2) or of Section 248(2) amounts to bypassing an important stage of the trial and omitting it altogether so that the trial cannot he said to be that contemplated in the Code.[60 61] Such a non-compliance cannot be considered as a mere irregularity in the course of the trial curable under Section 465.[60 61] It is much more serious and would be considered as vitiating the order of sentence particularly in those cases where the accused is deprived of the chance of getting a lesser sentence due to such absence of hearing. Secondly, when no opportunity has been given to the accused to produce material and make submissions in regard to the sentence to be imposed on him, failure of justice must be regarded as implicit, and Section 465 cannot have any application in such a case.[62]

Strictly speaking, the provision as to hearing the accused on the question of sentence applies only after the decision of court not to release the offender under Section 360 has been taken. The provision is not, therefore, helpful for making a decision as to the release of the offender under Section 360. Secondly, the provision has been made *only* in respect of trials before a Court of Session and trials of warrant cases by Magistrates and does not apply to other trials.

Wherever the Probation of Offenders Act is applicable, the court can call for the report of the probation officer who would then be under a duty "to inquire, in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him, and submit reports to the court[1]".[63 64 65]

Consideration, of report of probation officer is a condition precedent to the release of accused. Although the court is not bound by such a report hut it must call for it before it comes to its conclusion. Release without such a report would be illegal.[64 65]

C. DECISIONS AS TO PUNISHMENTS

Judicial discretion in sentencing

23.7

If in a trial the court finds the accused guilty and does not release him after admonition or on probation of good conduct, it *shall, after hearing the accused on the Question of sentenced* ***pass*** *sentence* ***upon*** *him*

60. *See.,* observations in *AUauddin Milan* v. *Slate of Bihar,* (1989) 5 SCC 5: 1989 SCC (Cri) 490: 1989 Cri Lj 1466: *Suryamoorthi* v. *Govmdaswamy.* (1989) 3 SCC 24:

61. For the rev; of C 465, *see supra,* para. *7.9(c).*

62. *Santa Singh* o *Stale of Punjab,* (1976) 4 SCC 190: 1976 SCC (Cri) 546. 553: 1976 C.n Lj

63. *See,* S. 14, Probation of Offenders Act, 1958.

64. *MCD* v. *State of Delhi,* (2.005} 4 SCC 605: 2.005 (Cri) 1322: 2005 Cri Lj 3077

65. This clause is applicable only in cases of trials before a Court of Session and trials of warrant cases by Magistrates. *See supra,* Ss. 235(2), 248(2), paras, *19.7(b),* 20.11

according to law.[66] Criminal courts have powers to pass only such sentences as are authorised by law.[67] The IPC provides six types of punishments—death, imprisonment for life, imprisonment (rigorous or simple}, forfeiture of property, and fine.[68] These are the main punishments provided by our criminal law system though occasionally certain disabilities like cancellation of licences, debarring to hold some elective offices, etc. may be provided as additional punishments under special laws.

The IPC and other penal laws normally prescribe the maximum punishment awardable in respect of each offence and then leave it to the discretion of the court to pass suitable sentence within such maximum limit. The policy of our criminal law as regards all crimes, including the crime of murder, is to fix a maximum penalty—the same being intended for the worst cases, leaving a very wide discretion in the matter of punishment to the judge.[69] In this connection the Supreme Court has observed:

> The policy of the law in giving a very wide discretion in the matter of punishment to the judge has its origin in the impossibility of laying down standards. Take, for example, the offence of Criminal Breach of Trust punishable under Section 409 of the Indian Penal Code. The maximum punishment prescribed for the offence is imprisonment for life. The minimum could be as low as one day's imprisonment and fine. It is obvious that if any standards were to be laid down with regard to several kinds of breaches of trust by the persons referred in that section, that would be an impossible task. Ail that could be reasonably done by the Legislature is to tell the Judges that between the maximum and minimum prescribed for an offence, they should, on balancing the aggravating and mitigating circumstances as disclosed in the case, judicially decide what would be the appropriate sentence.[70]

The question of punishment poses a complex problem which requires a working compromise between the competing views based on reformative, deterrent and retributive theories of punishments. The Supreme Court has had enough opportunities to deal with this exercise. In *Shailesb Jasvantbhai* v. *State of Gujarat*[71], reiterating the need for the courts to adopt suitable measures to contain the problem of crime, the court observed thus, "Proportion between crime and punishment is a goal respected in principle and in spite of errant notions, it remains a strong influence in the determination of sentence."

66. *See supra,* Ss. 235(2,), 248(2.), 255(2), paras. 19.7(6), *zo.rr[a],* 21.6(6).
67. *See supra,* Ss. 28, 29, para. 2.16.
68. *See,* S. 53 IPC.
69. *fagmohan Singh* v. *State ofU.P.,* {1973} 1 SCC 20: 1973 SCO (Cri) 169, 180: 1973 Cri LJ
70. *Ibid,* 182 [SCC (Cri)].
71. (2006) 2 SCC 359: (2006) *1* SCC (Cri) 499. Also read, *Alister Anthony Pareira* v. *State of Maharashtra,* (2012} 2 SCC 648: (2012) 1 SCC (Cri) 953: 2012 Cri LJ 1160; *Guru Basauaraj* v. *State of Karnataka,* (2012) 8 SCC 734:

Though a large number of factors fall for consideration in determining the appropriate sentence, the broad object of punishment of an accused found guilty in a progressive civilised society is to impress on the guilty party that commission of crime does not pay and that it is against both his individual interest and the larger interest of the society to which he belongs. The sentence to be appropriate should, therefore, be neither too harsh nor too lenient/[2] In considering the adequacy of the sentence which should neither be too severe nor too lenient the court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including his antecedents) and station in life of the offender.[72] [73] The quantum of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. In certain cases the court provides for appropriate sentencing. In *State* v. A. *Tarthiban*[7]*, the Supreme Court ruled that in the case of simultaneous conviction and sentence, the offender should not be punished with a more severe punishment than court would award to a person for anyone of the two offences. It was also pointed out in this case that the benefit of probation would not be extended to the convicts under the Prevention of Corruption Act.

In a case involving rape of a girl by police constables, the Supreme Court considered the role of the victim relevant for reducing the punishment. The court observed:

> ... the peculiar facts and circumstances of this case coupled with the conduct of the victim girl, in our view, do not call for the minimum sentence as prescribed under Section *yj6* sub-section (z). On the other hand, we hold that the proviso to that section can be invoked in the present case and a sub-minimum sentence will meet the ends of justice.[75]

This decision came to be reviewed by the Supreme Court which clarified that it did not make any reference to the character or reputation of the victim. The court responded to the reactions of its earlier decision thus:

72. *Ram Narain* v. *State ofU.P(1973)* 2 SCC 86: 1973 SCO (Cri) 752, 757: 1973 Cri LJ 1187; see also, *3.G. Goswami* v. *Delhi* Admn(1974) 3 SCC 85: 1973 SCC {Cri} 796, 800: 1974 Cri LJ 243; *see.* observations in A. *Muraleedhanm* v. *State of Kerala,* 1986 Cri Lj 904 (Ker) against lenient sentences.
73. *Modi Ram* v. *State of M.P.,* (1972} 2 SCC 630: 1973 SCC (Cri) 45, 47: 1972 Cri Lj 1521, 1522; see, *Dhananjay Chalienee* v. *State ofW.B.,* (1994) 2 SCC 220: 1994 SCC (Cri) 358; see also, *Ada Ram* v. *Mukna,* (2005) 10 SCC 597: 2005 SCC (Cri) 1655: AIR 2004 SC 3064; *State of M.P.* v. *Mmnna Cbouhey,* (2005} 2 SCC 71.0: 2005 SCC (Cri) 559; *Sbailesh jasvantbkai* v. *State of Gujarat,* (2006) 2 SCC 359: (2006) 1 SCC (Cri)
74. {200 6} *ix* SCC 473: {2007) 1 SCC (Cri) 520; *Slate ofT.N.* v. *Kaliaperumal,* {2005) 12 SCC 473: (2006) i SCC {Cri} 615.
75. *Prem Chand* v. *State of Haryana,* 1989 Supp (1} SCC 286: 1989 SCC (Cri) 418: 1989 Cri Lj 1246.

> We have neither characterised the victim, Suman Rani as a woman of questionable character and easy virtue nor made any reference to her character or reputation in any part of our judgment but used the expression 'conduct' in the lexigraphical meaning for the limited purpose of showing as to how Suman Rani had behaved or conducted herself in not telling any one for about 5 days about the sexual assault perpetrated on her till she was examined on March 28, 1984 by the Sub-Inspector of Police in connection with the complaint given by Ram Lai on March 22, 1984 against Ravi Shankar.[76]

It appears that in such cases in future the role of the victim might be considered a relevant factor in deciding the quantum of punishment.

Here it may be recalled what has already been mentioned earlier. Our processual system does not provide for comprehensive provision and adequate machinery for collection and presentation of the social and personal data of the culprit to the extent required in the verdict of the sentence.[77] However, it may be noted that in a criminal trial the court with a view to decide as to the guilt of the accused, is primarily concerned with all the facts and circumstances insofar as they are relevant to the crime and how it was committed. Therefore, so far as "crime" is concerned, all the facts and circumstances bearing upon the crime are legitimately brought to the notice of the court.[78] But that would not be enough to give adequate information to the court regarding the "criminal", his character and antecedents. The court may, however, obtain such information by hearing the accused on the question of sentence.[79] It is also possible to get such information by obtaining the report of the probation officer under the Probation of Offenders Act, 1958.[80] The Supreme Court had occasion to remit a case to the High Court for reconsideration inasmuch as there was no application of mind. Nor was the accused adequately heard.[81]

23.8 Sentence of death

In the whole of the IPC there is only one secrion [S. 303] where death is prescribed as the only punishment for murder by a person under a sentence of imprisonment for life; and even this lone section has been struck down by the Supreme Court as it was found violative of the constitutional provisions.[82] There are other sections in which death is one of the

76. ***State of Haryana*** v. ***Prem Chanda*** (1990) 1 SCC 2.49: 1990 SCC (Cri) 93: 1990 Cri
77. ***See supra,*** para, 2.3.6, ***also supra,*** note 52.
78. ***Jagmohan Singh*** v. ***State of U.P.,*** (1973) 1 SCC 20: 1973 SCC (Cri) 169, 185: 1973 Cri LJ 278
79. ***See supra,*** Ss. 235(2), 248(2) paras. 19.7(f)), 2.0.11 ***{a).***
80. ***See,*** S. 14, Probation of Offenders Act, 1958; ***see supra,***
81. ***See,*** discussions and precedents quoted in ***Ajay Pandit v. State***
82. ***Mithu v. State of Punjab,*** (1983) 2 SCC 277: 1983 SCC

alternative punishments prescribed for the offence.[83] The discretion given to the court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of the death penalty.

Section 354(3) requires that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence. Further, when any person is sentenced to death, the sentence shall direct that he be hanged bv the neck till he is dead. [S- 354(5)]

It would thus be noticed from Section 354(3) that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence.[84] It has been held by the Supreme Court that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3) and that the penalty of death may be awarded in the rarest of rare cases when the alternative option is unquestionably foreclosed.[85][86][87] It is not possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case. But a few may be indicated, such as, the crime has been committed by a professional or a hardened criminal, or it has been committed in a very brutal manner or on a helpless child or a woman or the like.[86][87] In this connection the observations of the Supreme Court in *Bach an Singh* v. *State of Punjab*[8]' *{Bachan Singh),* are quite pertinent. The court observed:

> As we read Sections 354(3) and .2.35(2.) and other related provisions of the Code of 1973, it is quite dear to us that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give

83. *See,* Ss. 12.1, 152, 194, 302, 305, 307, 396 IPC.

84. *Ambaram* v. *State ofM.P.,* {1976) 4 SCC 298: 1976 SCC (Cri) 610: *1976* Cri Lj 1.776, *1717;* see also, *Balwant. Singh* v. *State of Punjab,* (1976) 1 SCC 425: 1976 SCC (Cri) 43, 45: 1976 Cri Lj 29.1:. 293; *Joseph Peter* v. *State of Goa,* (7977) 3 SCC

85. *Bachan Singh* v. *State of Punjab,* (1980) 2 SCC 684: 7.980 SCC (Cri) 580, 647: 1980 Cri LJ 636; see also. *State* v. *Kanhu Char an Barit,* 7983 Cri Lj 133. 1.47 (Ori).

86. *Balwant Singh* v. *State of Punjab,* (1976^ *1.* SCC 425: 1976 SCC (Cri) 43, 45: 7976 Cri Lj 293, 293; see also, *Arnrk Bhushan Gupta* v. *Union of India,* (1977) *t* SCC 180: 1977 SCC (Cri) 66: 1977 Cri Lj 376; *Ediga Anarnma* v. *State of A.P.,* {1974) 4 SCC 443:

87. (1980) 2 SCC 684: 1980 SCC (Cri) 58c: 79So Cri Lj 636.

> to each of them. This is so because "style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder Is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said
> . • . 8S
> to exist.

Drawing upon the penal statutes of the States in the US framed after *Furman* v. *Georgia*[88 89], in general, and clauses *z{a), (b), (c)* and *(d),* Indian Penal Code {Amendment) Bill passed in 15)78 by the Rajya Sabha, in particular, the counsel in this case suggested certain specified circumstances as "aggravating circumstances" in which the court in its discretion may impose the penalty of death. The Supreme Court did not feel any objection to the acceptance of the suggested indicators but preferred not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.[90] In some cases, particularly those involving death penalty the Supreme Court used to list out aggravating and mitigating circumstances to be considered along with other factors to determine the appropriate sentence.[91]

Though the Supreme Court refused to fetter its discretion, it seems the court has been limiting the number of death sentence by evolving what is called "rarest of rare cases". Only in the rarest of rare cases do the courts award death penalty.[92 93]

It was held in *Sunil Damodar Gaikiuad* v. *State of Maharashtra*[1]* that judicial comity is an integral part of judicial discipline, and judicial discipline is the cornerstone of judicial integrity which requires binding decisions to be followed. However, in case there are newer dimensions not in conflict with ratio of larger Bench or where there is anything to he added to or explained, it Is always permissible to introduce the same. Consequently, poverty, socio-economic, psychic compulsions, undeserved adversities in life are some of the mitigating factors which are to be

88. *Ibid,* 644-45 [SCO (Cri)].
89. 35 L Ed zd 346: 408 XJS Z38 (1972,).
90. *Buchan Singh* v. *State of Punjab,* (1980) z SCC 684: 19So SCC (Cri) 580, 645: 1980 Cri Lj 636; also *see,* observations in *Triveniben* v. *State of Gujarat,* {1989} 1 SCC 678: 1989 SCC (Cri) 248: 1990 Cri Lj 18.10; *Aliauddin Mian* v. *State of Bihar,* (1989) 3 SCC 5: 1989 SCC (Cri) 490: 1989 Cri LJ 1466.
91. *Ramnaresh* v. *State of Chhattisgarh,* (zon) 4 SCC 157: (zoiz) z SCC (Cri) 3SZ: zoiz Cri Lj 189S; *Brajendrasnigh* v. *State of M.P.,* (zoiz) 4 SCC 289: (zoiz) z SCC (Cri) 409: zoiz Cri Lj 1883.
92. *Shivaji jcasing Babar* v. *State of Maharashtra,* (1991) 4 SCC 375: 1991 SCC (Cri) 972; *Day a Singh v. Union of India,* {1991} 3 SCC *61:* 1991 SCC (Cri) 523; *Sevaka Perumal* v. *State of T. N.,* (1991) 3 SCC 471: 1991 SCC (Cri) 724: 1991 Cri Lj 1845; *jumman Khan v. State of*
93. {20124} i SCC 129.

considered in addition to those indicated in *Bach an Singh*[94] and *Machhi Singh* v. *State of Punjab*[94 95] while awarding capital punishment.

The Supreme Court has also developed the practice of commuting death sentence if the death sentence could not be carried out for sometime due to the delays of the criminal justice system. Even though one may not agree with the court's decisions in some cases, it cannot be said that the court has not limited the instances of death penalty.[96]

A three-judge Bench of the Supreme Court in *Shatrughan Chauhan* v. *Union of India*[97] identified u non-exhaustive factors to be considered for commuting death sentence to imprisonment for life:

1. undue inordinate, unreasonable and unexplained delay in disposal of mercy petition;
2. mental illness/trauma due to delay in disposal of mercy petition;
3. non-receipt of written official communication from President/ Governor regarding rejection of mercy petition;
4. solitary confinement or single cell confinement prior to rejection of mercy petition;
5. lack of legal aid during trial and afterwards;
6. in limine dismissal of SLPs of death convicts;
7. age of convict;
8. non-application of mind by Minister concerned to relevant rights of death convicts while referring matter to President for rejection of mercy petition;
9. interval between date of execution and intimation to prisoner of the same;
10. rejection of advice tendered to President/Governor; and
11. good conduct.

The court, however, clarified that the nature of delay, *t.e.* whether it is undue or unreasonable, must be appreciated on the basis of facts of individual cases and no exhaustive guidelines can be framed in this regard

94. *Bacban Singh* v. *State of Punjab*, {1980) 2 SCO 684.
95. {1983) 3 SCO 470.
96. *Madhu Mehta* v. *Union of India*, (1989) 4 SCC 62.: 1989 SCC (Cri) 705: 1989 Cri LJ 2.321; *Dhananjoy Chatterjee* v. *State of* W.BU994) 2. SCC 220: 1994 SCC {Cri} 358; *Kumudi Lalv. State ofU.P* {1999} 4 SCC 108: 1.999 SCC (Cri) 491; *Jagdish Yadaw. State of Bihar*, {1999} 9 SCC 99: 1999 SCC (Cri) 464; *Nirmal Singh* v. *State of Haryana*, {1999} 3 SCC 670: 1999 SCC (Cri) 472: 1999 Cri Lj 1836. See also, *Neel Kumar* v. *State of Haryana*, {2,012.) 5 SCC 766: (2012) 3 SCC (Cri) 271; *Sandeep* v. *State of U.P.*, {2012) 6 SCC 107: (2012) 3 SCC {Cri} 18; *State ofU.P. v. Sanjay Kumar*, {20x2} 8 SCC 537: (2012) 3 SCC (Cri) 970; *Ramnaresh* v. *State of Chhattisgsrh*, {2012} 4 SCC 257: (2012) 2 SCC (Cri) 382: 2012 Cri Lj 1898; *Brajendrasingh* v. *State of M.P.*, (2012} 4 SCC 289: (2012) 2 SCC (Cri) 409: 2012 Cr; Lj 1883; *Swamy Shraddananda {2}* v. *State of Karnataka*, (2008) 13 SCC 767: (2009) 5 SCC (Cri) 113: 2008 Cri Lj 3911 etc.
97. {2014) 3 SCC T.

and only after satisfying that the delay was not caused at the instance of the accused himself.

This decision has been followed in V. *Sriharan* v. *Union of India*[1] where the court clarified that regardless and independent of the suffering it causes, delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby violates procedural due process guaranteed under Article 2,1 of the Constitution and the dehumanising effect is presumed in such cases. It is in this context that the Supreme Court in past has recognised that incarceration, in addition to the reasonable time necessary for adjudication of mercy petitions and preparation for execution, flouts the due process guaranteed to the convict under Article *zi* which inheres in every prisoner till his last breath.

The court's philosophy of sentencing has been reiterated in *Dbananjoy Chatterjee* v. *State of W.B.*[2] in the following words:

> In recent years, the rising crime rate—particularly violent crime against women has made the criminal sentencing by the court a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility.

In our opinion, the measure of punishment in a given case must depend upon "the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim."' The Supreme Court have had occasion to elaborate on this thus:

> The principle of proportionality between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has valuable application to the sentencing policy under the Indian criminal jurisprudence. While determining the quantum of punishment the court always records sufficient reasons.[4]

There had been a number of decisions dealing with imposition of capital punishment. In almost all the cases that came to be rendered no death- penalty had been imposed on the ground that there were no evidence indicating that the convict cannot be reformed. Pegging on the rule established in *Bacban Singh*[3] that generally the punishment for the offence of

1. (2014) 4 SCC -42..
2. (1994} 2. SCC 2.20: 1994 SCC (Cri) 558.
3. *Dhananjoy Chatter jee* v. *State of W.B.,* (1994} 2 SCC 220: 1994 SCC {Cri} 358; *see also,* observation in *Jai Kumar* v. *State ofM.P(1999}* 5 SCC r: 1999 SCC (Cri) 638; *Om Prakash* v. *State of Haryana,* (1999} 3 SCC 19: 1999 SCC (Cri) 334: 1999 Cri LJ 2044: *Ramji Rat* v. *State of Bihar,* (1999) 8 SCC 389: 1999 SCC (Cri) 1446; *State* v. *Nalini,* {1999) 5 SCC 253: 1999 SCC (Cri) 691.
4. *State ofV.P.* v. *Sanjay Kumar,* (20x2} 8 SCC 537: (2012) 3 SCC (Cri) 970.
5. *Bach an Singh* v. *State of Punjab,* {1980) 2 SCC 684.

murder should be life imprisonment and that the question of imposing death would depend upon the rarest of rare doctrine, different Benches of the Supreme Court had been avoiding imposition of capital punishment.[6]

The requirement that the judgment shall state the reasons for the sentence awarded would be a good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt.[7] It would also provide good material at the time when a recommendation for mercy is to be made by the court, or a petition for mercy is considered. It would increase the confidence of the people in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death), or in proceedings for enhancement of the sentence (where the sentence awarded is one of imprisonment).[8]

The decision of the trial court awarding the sentence of death is not final unless it is confirmed by the High Court. For this purpose, the trial court is required to make a reference to the High Court. Considering the irrevocable character of the death penalty, it is vitally important that a thorough scrutiny of the decision of the trial court is made as a necessary precaution against any possible mistake of the trial court in reaching that decision. It is settled position in law that for disposing of a reference under Section 366(1), it is the duty of the referee court to deal with the entire evidence and make its own appraisal of the material and come to an Independent conclusion.[9] [10] The provision regarding reference to the High Court is mandatory and is applicable irrespective of the appeal, if any, hied by the accused person. Also, as will be seen later in para. 2.3.18, Section 363(4) requires the court to inform the accused of the period within which he may prefer an appeal against the sentence of death.

Therefore, when the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. [S. 366(1)] The court passing the sentence shall then commit the convicted person to jail custody under a warrant. [S. 366(2.)]"

If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon,

6. See, Ofn v. *State ofT.N.*, {£0x3} 3 SCC (Cri) z0S; *Mohinder Singh* v. *State of'Punjab*, (2013) 3 SCC (Cri) 137; *Sandesh @ Sainath Kailas* v. *State of Maharashtra*, (2013) 3 SCC (Cri) 722; *Shankar Kisanmo Khade* v. *State of*
7. *See.* S. 354(3) mentioned above.
8. *See*, the observations in the 41st Report, p. 232, para. 26.10.
9. *State* v. *Gouranga Sahu.* 1978 Cri LJ 276. 279 (Ori); *State ofT.N.* v. *Rajendran.* (1999) 8 SCC
10. *Kehar Singh* v. *State*, 1987 Cri IJ 291 (Del).

any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session. [S. The inquiry contemplated under Section 367 would take in the examination of the accused under Section 3i3(i)(A).[12] When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such court. [S. 367(3)] Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken. [S. 367(2)]

The precautionary measure of the scrutiny of the decision by the High Court is further strengthened by Sections 369 and 370. Section 369 provides that in every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such court consists of two or more judges, be made, passed and signed by at least two of them. The words "at least two of them" clearly indicate that the hearing of reference by a Bench of two judges is the minimum, and envisage the possibility of Benches consisting of a larger number of judges.[13] Then Section 370 provides that where any such case is heard before a Bench of judges and such judges are equally divided in opinion, the case shall be decided in the manner provided by Section 392.[14] It has been ruled that when judges of appeal are equally divided under Section 392, the matter should be referred to a third judge and he shall be bound to accept the view of one of the two judges holding in favour of acquittal.[15]

In any case submitted by the Court of Session for confirmation of sentence of death, the High Court

(a) may confirm the sentence or pass any other sentence warranted by law, or

(.b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person.

However, no order of confirmation shall be made until the period allowed for preferring an appeal has expired, or if an appeal is presented within such period, until such appeal is disposed of. [S. 368]

Time and again the Supreme Court has pointed out that proceedings upon reference under Section 366 before the High Court in fact are a continuation of the trial on the same evidence or additional evidence.

Vi. *See*, discussion in *K. Govindaswami Filial* v. *Gout, of India*, 198 *6* Cri Lj 132.6 {Mad}.

12. *Kaliratn* v. *State of Maharashtra,* 1989 Cri Lj 1625 (Bom).
13. *Satwanl Singh* v. *State*, 1986 Cri LJ 1352. {Dei).
14. For the discussion on S. 392., *see infra*, para. 24.13.
15. *Radha Mohan Singh* v. *State ofV.P.*, (2006) 2 SCC 450: (2006) 1 SCC (Cri) 66r.

Therefore, it is the duty of the High Court to re-appraise the entire evidence and consider the proceedings in all their aspects and then come to an independent conclusion on the merits of the case.[16]

Ordinarily in a criminal appeal against conviction, the appellate court can dismiss the appeal if the court is of the opinion that there is no sufficient ground for interference after examining the various grounds urged before it for challenging the correctness of the decision of the trial court. It is not necessary for the appellate court to examine the entire record for the purpose of arriving at an independent conclusion. The position, however, is different where in addition to an appeal hied by an accused who is sentenced to death, the High Court has to dispose of the reference for confirmation of the death sentence under Section 366. While dealing with a reference the High Court is expected to consider the proceedings in all their aspects and come to an independent conclusion on the material on record apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under Sections 366 to 368 mentioned above it is for the High Court to come to an independent conclusion of its own.[17] Where the reference under Section 366 and the appeal against the conviction and sentence of death arise from the same order of conviction, the uniform practice of the High Courts has been to hear both the reference and the appeal together and to deal with the merits of the case. In such a case the Madras High Court ordered further investigation after suspending conviction and sentence of death imposed by the Sessions Court.[18]

In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court and attested with his official signature, to the Court of Session, [S. 371]

[A] ***6. Kartarey*** v. ***State of V.P.,*** {.1976) 1 SCC 172: 1975 SCC (Cri) 803, 810: 1976 Cr; LJ 13; ***see also,*** the observations in ***State of Maharashtra*** v. ***Sindhi,*** (1.975} [1] SCC 647: 1975 SCC (Cri) 283. 288: 1975 Cri LJ 1475; ***State ofT.N.*** v. ***Rajendran***. {1999} 8 SCC 679: 2000 SCC (Cri) 40.

11. ***Charan Singh*** v. ***State of Punjab,*** (1975) 3 SCC 39: 1974 SCC (Cri) 735, 743: 1974 Cri L] 1253, 1257; see also, ***Bhupendra Singh*** v. ***State of Punjab,*** 1969 Cri LJ 6: AIR 1968 SC 1438; ***Juniman*** v. ***State of Punjab,*** >.957 Cri Lj 586: AIR 1957 SC 469; ***Net! Sreeramulu v. State of*** A.P., (2974} 3 SCC 314: 1973 SCC (Cri) 940, 942: 1973 Cri Lj 1775; ***Mari Mar Singh*** v. ***State of U.P.,*** (1975} 4 SCC 148: 1975 SCC (Cri) 405: 1975 Cri Lj 1315; ***Balak Ram*** v\ ***State ofU.P.,*** (1975) 3 SCC 219: 1974 SCC (Cri) S37, 856: 1974 Cri. Lj 1486, 1498; ***Masalii*** v. ***State*** ofU.P., (1965} ***1*** Cri Lj 226': AIR 1965 SC 202; ***Rama Shankar Singh*** v. ***State of*** W.B., (1962) 2 Cri Lj 296: AIR 1962 SC 1239; ***State*** v. ***Gouranga Sabu,*** 1978 Cri Lj 276, 279 (Ori).

18. See, ***Katturaja*** v. ***State,*** (2013) 2 CTC 72: (2013} ***1*** MWN (Cri) 267, Criminal Appeal (MD) No. 19 of 2013,. order dated 31-1-2013 (Mad) ***[per*** Naganusthu j).

23.9 Sentence of imprisonment

In the case of a large majority of offences the IPC and other penal laws provide punishments of imprisonment of varying terms. Normally these laws prescribe the maximum term of imprisonment awardable in respect of any offence. The law does not, except in very exceptional circumstances, prescribe the minimum term of imprisonment that the court must, in the least, award for an offence. Where the offence is punishable with imprisonment, the policy of our law is to give adequate discretion to the court in awarding a suitable term of imprisonment. In exercising this discretion the court takes into consideration several factors, such as the gravity of the offence, the motive of the offender, the harm caused to the victim, the circumstances in which the offence was committed, the age, character and antecedents of the offender, etc.

The judicial discretion in awarding the sentence of imprisonment is, to an extent, canalised and guided by law. For instance, by prescribing the maximum term of imprisonment awardable in respect of any offence, the law thereby indicates to the court the punishment which is to be awarded for the offence of its gravest kind. Therefore, it is rarely necessary in practice to go up to the maximum. Where minimum and maximum sentences are prescribed by statute, both are imposable and it is for the court to decide what would be the adequate sentence in the facts and circumstances of the case.[19]

There is some real risk involved in sending persons, particularly young offenders or first offenders to prison, because such persons, instead of being reformed there in jail, are more likely to become obdurate criminals as a result of their association with hardened criminals of mature age. It has been observed in the Report of the Indian jails Committee:

> Whatever improvements may be effected in prison administration, it must, we fear, still remain true that imprisonment is generally evil and that ail possible measures should be taken to avoid commitment to prison when any other course can be followed without prejudice to the public interest.[20]

Section 360 of the Code, the Probation of Offenders Act, ipyS, and more particularly Section 361 CrPC, as mentioned earlier,[11] provide guidelines to the court in order to avoid prison-sentences wherever it is possible to do so.

While considering the imposition of a prison-sentence, it should also be noted that short-term imprisonment does not serve a useful purpose. A short stay in jail sometimes proves more harmful to the accused. It brands a person as a previous convict without affording him the advantage of

19. *Bhupmder Singh* v. *Jarnall Singh*,

20. The Report of the Indian jails

living a disciplined life in a jail for a sufficiently long time.[22] Therefore, with a view to discourage short terms of imprisonment, sub-section {4) of Section 354 provides:

> When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the
>
> Court or unless the case was tried summarily under the provisions of this Code.

For obvious reasons the restriction on short term prison-sentences is not applicable in a case tried summarily.[23] * Further, this restriction does not apply to a sentence of imprisonment till the rising of the court. There is some justification for this exception. For certain offences the punishment of imprisonment is mandatory as no other punishment in the alternative is provided by law: also the law might not have fixed any minimum term of imprisonment to which the accused must be sentenced. Now if in such a case the court considers it undesirable to send the offender to prison, the court may, in order to comply with the letter of the law, pass a sentence of imprisonment till the rising of the court, and at the same time avoid sending the offender to jail. This in fact works as an alternative to prison- sentence and not a short term prison-sentence. It is, therefore, reasonable to exclude the operation of Section 354(4) in such a case.

Where an accused person is convicted of several offences at one trial, the total quantum of punishment shall be determined according to the provisions of Section 31. That section reads as follows:

Sentence m cases of cmmctim of severa; offences at

> 31. (1} When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of i860), sentence him for such offences, to the several punishments pre-scribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of
>
> the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.
>
> (2} In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:
>
> Provided that:
>
> *(a)* in no case shall such person be sentenced to imprisonment for a longer period than fourteen years:
>
> *(b)* the aggregate punishment shall not exceed twice the amount of

22. *See*, observations in *Lekh Raj* v. *State*. 1360 Cri Lj 12.34: AIR 1:960 Piny 4S2, 483-84.
23. According to S. 2.62(2.), in a summary trial no sentence of imprisonment for a term exceeding three months can be passed in case of any conviction. *See supra*,

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

The sentences which a Magistrate or a judge is competent to pass have been mentioned in Sections 28 and 29 and have already been discussed in para. 2.16.

The above Section 31 is subject to the provisions of Section 71IPC and will not affect them. Section 71 IPC reads as follows:

71. *Limit of punishment of offence made up of several offences*.—Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

Section 31 deals with cases where a person is convicted of several offences at one trial. In such cases the trial courts should pass separate sentence for separate offence.[24] And there may be situations where a person who is already undergoing a term of imprisonment is again convicted in a different trial by the same court or by any other court for any offence or offences. In such circumstances Section 427 empowers the court to decide as to whether the subsequent sentence of imprisonment shall commence after the expiry of the previous sentence or whether it shall run concurrently with the previous one.[25] It has been reiterated that unless specifically mentioned by the court, sentences shall not be allowed to run concurrently.[26] Section 427 has been discussed in para. 27.11, *infra'*, and the same along with Section 31 should be kept in view when a sentence of imprisonment is passed by a court for any offence.

23.10 Sentence of fine

Usually fines are prescribed as punishment for offences which are not of serious type. Fine is sometimes provided as a punishment to be imposed in addition to the punishment of death or imprisonment. In respect of some offences it is' prescribed as an alternative to a sentence of imprisonment, Usually the law prescribes the maximum limit to which the fine

24. *State of Karnataka* v. *Mohd. Jaffer.*, 1991 Cri Lj 777 {Kant}; *Naresh jammed Lohana* v. *State of Gujarat*, 1998 Cri Lj 5574 (Guj).
25. *See*, discussions in *Ranjit Singh* v. *UT of Chandigarh*, (1991) 4 SCC 304: 199! SCC (Cri) 965.
26. *hiathu Ram Bansal* v. *State of Haryana*, 1997 Cri Lj 14x3 fP&H}.

may extend; the minimum is not normally fixed. The court while exercising the discretion in fixing the amount of fine wall take into consideration several circumstances including the financial condition of the accused person.[27] It has been specifically provided that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, *but shall not be* excessive.[28]

If a person is convicted of an offence punishable with imprisonment and/or fine, or with fine only, and is sentenced to a fine (whether with or without imprisonment), it shall be competent to the court which sentences such offender to direct by the sentence that in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of a sentence.[29]

The Supreme Court has of late shown the trend of awarding fine/com- pensation in place of imprisonment or imprisonment with fine and insisting for the revival of the original punishment in case of failure to pay fine/ compensation. In *Jacob George* v. *State of Kerala*™, the Supreme Court substituted the punishment of four years' rigorous imprisonment and ^ 5000 imposed by the Kerala High Court with an amount of *f* 1,00,000 and a condition that in case of failure the Kerala High Court's sentence will revive. In yet another case, i.e., *Siyasaran* v. *State of* M.P.[30], the Supreme Court, in view of the lapse of more than 12 years after the occurrence and the fact of the accused having remained on bail for most of the time, imposed a fine of A 50,000 to be paid to the injured. The court added that if he failed to pay, his original punishment was to revive.

(1) The term for which the court directs the offender to be imprisoned in default of payment of fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.[32] Further, if the imprisonment in default of payment of fine is awarded by a Magistrate, it is essential that the term of such imprisonment

(a) is not in excess of the powers of the Magistrate under Section 29 of the Code;[33]

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the

2/. P.B. *Aind* v. *State of Maharashtra*, 1995 Cri Lj :i 694 (Bom).
28. *See*, S. 65 IPC.
29. *See*, S. *64* IPC. See also, *P. Balaraman* v. *State*, 1991 Cri Lj 366 (Mad).
30. 11994} 3 SCC 430: 1994 SCC {Cri) 774.
31. 1995 Cri LJ 2.126.
32. *SeelS*. 65 IPC.
33. For the contents of S. 29, *see supra*, para. 2.16.

offence otherwise than as imprisonment in default of payment of the line. [S.

30(i)][34]*

The imprisonment awarded by a Magistrate as above mentioned may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 2.9. [S. 30(a)]

(2.) If the offence be punishable with fine only, the imprisonment which the court imposes in default of payment of the fine shall be simple and the term for which the court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed A 50 and for any term not exceeding four months when the amount shall not exceed A 100, and for any term not exceeding six months in any other case.[35]

D. PRECAUTIONARY AND PREVENTIVE ORDERS

23.11

Certain habitual offenders required to notify their whereabouts

In order to prevent the commission of certain offences provisions have been made to enable the authorities to keep a watch on the whereabouts of persons indulging in such crimes. While passing any sentence on any habitual thief, robber, cheat, burglar, counterfeiter of coins and currency notes,, etc., the court may, according to Section 356, require that the whereabouts of such an offender shall be notified in the prescribed manner for a period extending up to five years from the date of his release. Section 356 is as given below:

Order for notifying address or previously convicted offender

356. (x) When any person, having been convicted by a Court in India of an offence punishable under Section 2.15, Section 489-A, Section 489-B, Section 489-C, or Section 489-D or Section 506 {in so far as it relates to criminal intimidation punishable with imprisonment for a term which may extend to seven years or with fine or with both)[36] of the Indian Penal Code {45 of i860), or of any offence punishable under Chapter XII [37][or Chapter XVIj or Chapter XVII of that Code, with imprisonment for a term of three years or upwards, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by any Court other than that of a Magistrate of the second class, such Court may, If it thinks fit, at the time of passing a sentence of imprisonment on such person, also order that his residence and any change of, or absence from, [34][35][36][37]

34. *Bidban Bisoi* v. *State of Orissa.* 1989 Cri Lj 1038 (Ori),
35. See, S. 67 IPC.
36. The offences of S. 506 I PC came to be incorporated ander the Code of CrPC (Amendment) Act, 2005.
37. *Ins.* by Act 25 of 2005, S. *2.9(b)* (w.e.f. 23-6-2.006}.

such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence,

(z) Tfie provisions of sub-section (i) with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences and attempts to commit them.

(3) If such conviction is set aside on appeal or otherwise, such order shall become void.

(4} An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) The State Government may, by notification, make rules to carry out the provisions of this section relating to the notification of residence or change of, or absence from, residence by released convicts.

(6) Such rules may provide for punishment for the breach thereof and any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.

23.12

Preventive measure against the risk of breach of peace

When a court convicts a person of an offence involving breach of the peace, the court may, in addition to the sentence that it may award for the offence, order the offender to give security for keeping the peace for a specified period not exceeding three years. This has been provided by Section 106 which reads as follows:

Security for keeping the peace on conviction

x06. it) When a Court of Session or Court of a fCagistrare of the first class convicts a person of any of the offences specified in sub-section, (z) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

(z) The offences referred to in sub-section (i) are—

(a) any offence punishable under Chapter VIII of the Indian Penal Code (45 of i860), other than an offence punishable under Section 153-A or Section 153-B or Section 154 thereof;

(b) any offence which consists of, or includes, assault or using criminal force or committing mischief:

{c) any offence of criminal intimidation:

(d) any other offence which caused or was intended or known to be likely to cause, a breach of the peace.

(3) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(4) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.

If any person, in respect of whom an order requiring security is made under Section 106, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence. [S. 119(1)]

The provisions contained in Sections 120 to 124 regarding the contents of bond, court's power to reject sureties, imprisonment for failing to give security, release from such imprisonment under certain circumstances, conditions in which fresh security is asked for, are applicable both in case of security for keeping peace under Section 106 as well as in cases of security for keeping peace and for good behaviour under Sections 107 to no. These provisions, therefore, have been discussed separately in Part II, Chapter 28 dealing with preventive measures.[38]

E. Compensation and costs

3.13 Guilty person to compensate the victim and to pay the costs of the prosecution

The function of a criminal court is to punish the offender while that of a civil court is to make the wrongdoer compensate for the loss or injury caused to the aggrieved party. However, if these two procedures can be combined without affecting the criminal and civil process, it would be just and expedient to do so as it would save time and money in seeking remedies in two different courts. Section 357 incorporates this idea to an extent and empowers the court to grant compensation to the victim and to order the payment of costs of the prosecution. Section 357 reads as follows:

Order to pay compensatio

357- T) When a Court imposes a sentence of fine or a sentence (including a sentence of death} of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, crim-
inal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted

38. See *infra*, paras. 2.8.5-2.8.14.

in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(z) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3} When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Under the above section compensation can be awarded irrespective of whether the offence is punishable with fine and fine is actually imposed; but such compensation can be ordered only if the accused is convicted and sentenced. The compensation should be payable for any loss or injury whether physical or pecuniary, and the court shall have due regard to the nature of the injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors.[39]

Under sub-section (1) of Section 357, compensation could be directed to be paid only if the accused is punished with a sentence of fine or with some other sentence of which fine formed part; and secondly, it could be directed to be paid out of the amount of fine recovered. Consequently, the amount of compensation could in no case exceed the amount of fine; and the quantum of fine would again depend upon the limit up to which the fine was award able for the particular offence and also upon the extent to which the court had power to impose fine.

However, compensation can be granted under sub-section {3) of Section 357 quite liberally and without any such abovementioned restrictions. But it will be noticed that the liberal provisions of sub-section (3) are applicable only if a sentence of fine is not imposed. If the sentence of fine is imposed, compensation can be ordered to be paid only out of the amount of fine as mentioned in sub-section (i) of Section 357. The object of Section 357(3} is to provide compensation payable to the persons who are entitled to recover damages from the person sentenced even though fine does not form part of the sentence [40]

39. Notes on els. 361-73. *See also,* observations in *Hari Singh* v. *Sukhhir Singh.* (1988) 4 SCC 551: 19-88 SCC (Cri) 984: 1989 Cri

40, *Sarwan Singh* v. *State of Punjab,* {1978} 4 SCC m: 1978

It is rather surprising that the power of a Magistrate or judge to grant the amount of compensation under Section 357(3} is unlimited. A Magistrate of the Second Class, for instance, has power to pass a sentence of fine not exceeding ^ 1000;[41] but if the same Magistrate instead of imposing a fine awards compensation under Section 357(3), he can do so without any apparent limit; and the amount of compensation in such a case can even be A 10,000 or A 50,000 depending upon the loss or injury to the victim. Further, unlike sub-section (1), sub-section (3) does not make any provision for the payment of costs incurred in the prosecution.

For sustaining an order directing expenses to be paid to the State under clause *{a}* of Section 357(1), there must be a substantive sentence of fine. In the absence of such a sentence of fine, no direction under clause *(a)* can be made.[42]

Clause *{b)* of Section 357(1) deals with payment of compensation to the very person to whom any loss or injury has been caused as a result of the offence committed against him or his property and when compensation is recoverable by *such person* in a civil court.[43]

The question of recovering "fine" and "compensation" has been examined by the Supreme Court. It was opined that in default to pay compensation the accused shall suffer simple imprisonment. Such an order could be issued under Section 357(1) inasmuch as it alone empowers the court to order fine. If the compensation ordered in terms of Section 357(3) is not paid, it could be ordered to be paid under Section 421 of the Code.[44]

The court in a subsequent decision held that compensation ordered under Section 357(3} could be realised as a fine in terms of Section 431 read with Section 64 IPC. The court while imposing fine would be competent to include a default sentence to ensure payment.[45]

The distinction between "fine" under Section 357(1} and "compensation" under Section 357(3} came to be examined again in *K.A. Abbas* v. *Sabu Joseph*[46]. The question was whether in default of payment of compensation ordered under Section 357(3), a default sentence can be imposed. Though fine and compensation are distinct it is a fact that they can be recovered as fine.

In *R. Mohan* v. *A.K. Vifaya Kumar*[47], the Supreme Court again got an opportunity to examine this question. Section 431 provides for recovery of any money other than fine payable by virtue of any order made under

41. *See*
42.
43.

44. See,
45. See,
Vt4ay
46. (2010) 6
47. -[2012)

the Code and the recovery of which is not otherwise provided for. Thus compensation can be effectuated by Section 431 which lays down that money can be recovered as if it is a fine. And proviso to Section 431 says that Section 421 could be relied on for recovery, the court reasoned:

> If Section 421 ot the Code puts compensation ordered to be paid by the court on a par with fine so far as mode of recovery is concerned, then there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in case of default in payment of fine under Section 64 IPC.[4S]

Clause (c) of Section 357(1) enables the court to direct that the whole or any part of the fine recovered may be applied in paying compensation to the persons who are under the Fatal Accidents Act, 1855 entitled to recover damages from the person sentenced for the loss resulting to them from the death of the person whose heirs, as described in the Act of 1855, they claim to be.[48 49 50 51]

In awarding compensation, the court should not first consider what compensation ought to be awarded to the heirs of the deceased and then impose a fine which is higher than the compensation. It is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation.'[10] The Supreme Court has urged the courts to exercise the power under Section 357 liberally. It has also been held that if there are more than one accused, they may be asked to pay in equal terms unless their capacity to pay varies. The payments may also vary depending upon the acts of each accused. The court has also opined that reasonable period for payment of compensation, if necessary by instalments, can be given. The court may enforce the order by imposing sentence in default.'[11] It is only appropriate to direct payment of compensation to the dependants of the victim by the accused who has the capacity to pay. In case of murder, it is only fair that proper compensation should be provided for the dependants of the deceased.[48 49 50 51 52 53]

The Supreme Court in *Ank ush Shivaji Gaikwad* v. *State of Maharashtra*[5] have had an opportunity to deal with the often forgotten victim compensation. It is a case wherein the appellant's conviction under Section 302

48. *Ibid*, 72.9.
49. *Ibid*.
50. *Sarwan Singh* v, *State of Punjab*, {1978) 4 SCC m: 1978 SCC (Cri) 549. 556: 1978 Cri Lj 1598, 1603; see also, *Palaniappa (Sounder* v. *State ofT.N.*, {1977) *2*. SCC 634: 1977 SCC (Cri)
51. *Hari Singh* v. *Sukhbir Singh*, (1988) 4 S CC 5 51: 1 98 8 6CC (Cri; 984: 1989 Cri
52. *Guruswamy* v. *State ofT.N.*, (1979) 3 SCC 797: 1979 SCC (Cri) 879, 88r: 1979 Cri Lj 704, 706; *Putta Charnsiab* v. *State*, 1999 Cri
53. (2013) *6* SCC 770.

was altered to one under Section 304, Part II reducing his punishment of life imprisonment to five years' rigorous imprisonment.

The court thought it proper to examine the history of victim compensation in India and abroad and emphasised its importance and relevance thus:

> Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provision relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision^[4]

Incidentally, the court did not grant compensation. Nor did it remand the case to the lower courts for awarding compensation.

In 2009, Section 357-A was added to the Code. It came into effect from 31 December 2009.[53] It enacts thus:

357-A. (1) Every State Government in coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Services Authority or the State Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under subsection (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

Victim compensation

(6) The State or the District Legal Services Authority as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility [54] [55]

54. ***Ibid*, 793.**
55. **Act 5 of £009, S. 18.**

or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appro-
priate authority deems fit.

Victim compensation scheme has thus been strengthened by assigning role to the State Governments and Legal Services Authority in its implementation. The scheme is made applicable to the victims irrespective of the outcome of the prosecution. A few States have already initiated action, others are on the way.

Protection of the victims has now been enhanced by the incorporation of Sections 357-B and 357-C which run as follows:[56]

Compensation to be in addition to fine under Section 326-A or Section 376-D of Indian Penal Code

357-B. The compensation payable by the State Government under Section **357**-A
shall be in addition to the payment of fine to the victim under Section 32.6-A or Section 376-D of the Indian Penal Code (45 of i860).

Treatment of

357-C. AH hospitals, public or private, whether run by the Central Government,
the State Government, local bodies or any other person, shall immediately provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Section 32.6-A, 376, 376-A, 376-B, 376-C, 376-D or Section 376-E of the Indian Penal Code (45 of i860), and shall immediately inform the police of such incident.

23.14

Successful complainant to get costs in non-cognizable cases

In this connection Section 359 provides as follows:

Order to pay costs in non-coanizable cases

359- (1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days and such costs may include any expenses incurred in respect of process-fees, witnesses and pleader's fees which the Court may consider reasonable.

{2.} An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

It may be noted that the court is empowered under this section to order **O**he accused to pay the costs to the complainant in addition to the penalty nposed upon him,

compensation for wrongful arrests

23.15

Section 358 empowers the court to order a person to pay compensation to another person for causing a police officer to arrest such other person

56. Criminal Law (Amendment) Act, 2,013. Came into force from 5-2.-2.013.

Compensation to persons groundless ly arrested

358. (i) Whenever any person causes a police officer to arrest another person, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding one thousand rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(1) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding one thousand rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such surn is sooner paid.

Usually It is the police officer who investigates and makes the arrest and the complainant, if at all can be considered to have a nexus with the arrest, it is rather indirect or remote. For applying Section 358 some direct and proximate nexus between the complainant and the arrest is required.[57] It has been held that there should be something to indicate that the informant caused the arrest of the accused without any sufficient grounds.[58] There have been instances where the judiciary ordered compensation by the State to be paid to the victim because of the failure of the police to process prosecution. In such a case, the police was asked to bear the cost of petition against them filed by victims of their illegal acts. In another case, the High Court in exercise of inherent powders ordered the complainant to pay compensation to the harassed defendant; in yet another the complainant was asked to pay the cost to the government, rather than to the defendant.[59]

The section does not make any express provision for giving an opportunity to the complainant or other concerned person to show that there was sufficient ground for causing the arrest to be made or to show cause as to why an order to pay compensation under this section should not be passed against him. However, looking to the consequences which are likely to follow from the order of payment of compensation, the principles of natural justice would require that such an opportunity should be given to the complainant or other concerned person.[60]

57. *Mallappa*
58. *Pramod*
59. *Hii zuri Chou' oey* v. *State*
60. *Shah Gbandidal G aka Idas* v. *Patel Baidevbbai Ranchhoddas*, 1980

F. Pronouncement of judgment

Modes of pronouncing the judgment **23.16**

The judgment of the trial court represents the final episode in the trial of the accused. A judgment in this context is the final decision of the court intimated to the parties and the world at large by formal "pronouncement" or "delivery" in open court.[61] The rules made by the Code in respect of the delivery or pronouncement of the judgment are mainly intended to secure certainty in the ascertainment of what the judgment was. Therefore, until the judgment is "delivered" or "pronounced" in compliance with such rules, it is strictly speaking no "judgment", and the judge can at such a stage change his mind and make alterations in the judgment. Section 353 which deals with the modes of pronouncing a judgment, reads as follows:

Judgment

353* (t) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders,—

[a) by delivering the whole of the judgment; or

(f?) by reading out the whole of the judgment; or

ic) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

{2) Where the judgment is delivered under'clause *{a)* of sub-section (t), the presiding officer shall cause it to be taken down in shorthand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in open Court.

(3) Where the judgment or the operative part thereof is read out under clause (/?) or clause (c) of sub-section (1), as the case **may** be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him.

(4) Where the judgment is pronounced in the manner specified in clause *{c)* of sub-section (x), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.

(5) If the accused is in custody, he shall be brought up to hear the judgment pronounced.

(б) If the accused is not in custody, he shall he required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted:

Provided that, where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment *is* to he pronounced, the presiding officer may, in order to avoid undue delay in the

61. *Iqbal Ismail Sod a iv ala* v. *State of Maharashtra*, (1975) 3 SCC 140: 1974 SCO (Cri) 764. 77T: 1974 Cri Lj 1:291, 1295;

(7) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(8) Nothing in this section shall be construed to limit in any way the extent of the provisions of Section 465.

The expression "after the termination of the trial" in Section 353(1) only means after the entire evidence both on behalf of the prosecution and on behalf of the defence is recorded and arguments are heard. It cannot, however, be said that the trial of a criminal case comes to an end as soon as the evidence is recorded and that the ultimate judgment pronounced in a case forms no part of a trial.[62]

Where the judgment is pronounced by delivering the whole of it in open court under clause *(a)* of sub-section (1) above, the presiding officer is required by sub-section (z) to cause it to be taken down in shorthand and to sign the transcript and every page thereof *as soon as it is made ready* and to write on it the date of the delivery of the judgment in open court. As will be seen later, Section 363 requires that where the judgment is appealable by the accused he is given a certified copy of the judgment *free of cost and without delay*. But if the supply of copy of the judgment is inordinately delayed because of the delay in the preparation of the transcript as mentioned in sub-section (z), the consequence would inevitably be that the accused would not be able to file an appeal and obtain an order from the appellate court for his release on bail within a reasonable time even though it be a fit case for his release on bail. Secondly, another result of the above delay would be that a convicted person who is sentenced to undergo imprisonment for a short period would undergo the entire sentence of imprisonment by the time the copy of the judgment is supplied to him. The right of appeal for such a convicted person would be thus rendered illusory even though he may have a good arguable case in appeal.[63] This would indicate the necessity of prompt and expeditious transcription when the judgment is delivered in open court under clause *(a)* of sub-section (1).

The Supreme Court has rightly disapproved the undesirable practice of some judges delivering judgments after several months since completion of hearing. The court has correctly perceived it to be a violation of the speedy trial, a right enshrined in Article zi of the Constitution.[64]

62.

63. *al Ismail Sodawal*

64. *Anil Rai* v. *State of Bihar,*

Where the judgment or the operative part thereof is read out under clause *{[?}* or clause *{c)* of sub-section (i), it shall be dated and signed by the presiding officer in open court. [S. 353(3)] However, any defect or irregularity in such dating and signing can be cured by Section 465.[65] [66] In this connection the Supreme Court has observed:

> Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest—the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter—can be cured; but not the hard core, namely, the formal intimation of the decision and its contents formally declared in a judicial way in open court. The exact way in which this is done does not matter. In some courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection.[66]

Where the case in the High Court was heard by a Bench of two judges and the judgment was signed by both of them but delivered in court by one after the death of the other, it was held that there was no valid judgment and that the case should be reheard.[67]

A question whether a Sessions judge could pronounce the judgments passed by one judge in two cases on an earlier day but handed over to him after two weeks, has come up for decision. The Kerala High Court answered the question in the affirmative saying that the subordinate courts are also having what could be called auxiliary powers to do what is necessary for dispensation of justice, even in the absence of specific provision if there is no prohibition.[68] In this connection it may, however, be pertinent to note that the Supreme Court has categorically stated that there is no inherent power with the subordinate courts.[69]

When the court announces its decision on one day and delivers its reasons on another, the reasons must bear the date on which they are made known in open court. This has been the practice of the Supreme Court. This is also the practice of the Privy Council.[70]

It is quite evident from sub-sections (5) and (6) that it is the duty of the trial court to secure the attendance of the accused in court at the time of delivering a judgment of conviction by which the accused is sentenced to a

65. For the text of S. 465, *see supra*, para. 7.9(c).
66. *Surendra Singh* v. *State* o/U.P1954 Cri IJ 475, 477: AIR 1954 SC 394.
67. *Ibid.*
68. *District and Sessions Judge, re*, 1986 Cri LJ 1966 (Ker).
69. *Bindesbwari Prasad Singh* v. *Kali Singh*, {1977) 1 SCC 57: 1977 SCC (Cri) 33: 1978 Cri Lj 187.
70. *Mobd. Masootn* v. *Union of India*, 1979 Cri Lj 365. 368 (Del).

substantive sentence of imprisonment.[71 72 73] However, in order to avoid undue delay in the disposal of the case in which there are two or more accused persons, the court can pronounce the judgment in the absence of any of the accused persons in the circumstances mentioned in the proviso to subsection (6) above.

23.17 Court not to alter judgment

Save as otherwise provided by this Code or by any other law for the time being in force, no court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. [S. 362]

Section 362 is not restricted to the judgments of the trial court alone. The section is general in its application and prohibits all courts from altering or reviewing their judgment once it had been signed.[72 73] It has been opined that taking cognizance is a final order for the purposes of Section 362." It has also been opined that after exercising jurisdiction under Section xpo, the Magistrate ceases to have power to review the order. Therefore, a Magistrate, after dropping a case on considering the police report, cannot take cognizance of offence on examination of protest petition and the witnesses of the complainant.[74] It is wide enough to include High Court in its sweep.[7']

Finality attaches to a judgment or final order disposing of a case. A judgment or a final order must be clearly distinguished from an interlocutory order. It is obvious that Section 362 only precludes alteration of a final judgment and keeps intact the power of a court to pass different orders from stage to stage insofar as an interim or interlocutory matter is concerned. For substance, a bail may be refused once and granted a second time or a charge may be framed and modified.[76]

The provisions of Section 362 cannot be got over by saying that recall of a judgment or final order is not an alteration or review of the same within the meaning of the section. Such an approach will not be well

71. *See*, the
72. *Chandmhali v. State*, 1979
73. *PCI v. jayashankar*
74. *P.V. Krishna Prasad* v. *K.V.N. Kotesiuara Rao*, 1991
75. *Rajtd* v. *State*
76. *Desh Rai* v. *State*,

founded. What a court is prohibited from doing directly, cannot be done by it indirectly.[77]

The words "save as otherwise provided by this Code" would exempt the order passed under Section 348 discharging the offender on submission of an apology[78] from the operation of the rule contained in Section 3 62 regarding the finality of judgment or final order. The words "save as otherwise provided by this Code or by any other law for the time being in force" refer to those provisions only where the court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the High Court as given by Section 482 is not contemplated by the saving provision contained in Section 362, and Section 482 cannot be invoked for altering, or recalling or reviewing a judgment when the prohibition contained in Section 362 is applicable.[79]

A clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. It represents that which the court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on argument or disputation. An arithmetical error is a mistake of calculation, and a clerical error is a mistake in writing or typing.[80]

Both with regard to the appellate and revisional jurisdiction of the High Court there is no power to review or revise its earlier judgment, except to correct clerical errors. Even an alteration or modification in the sentence passed earlier would amount to review in the eye of law*.[81]

The question whether the High Court in exercise of its power under Section 401 or 482 is competent to order the sentences to run concurrently when the convictions and sentences that have been passed by two criminal courts of two different Sessions Divisions have become final, has been answered in the affirmative.[82]

The question whether the High Court can order two sentences concurrent under Section 482 has also been answered in the affirmative by the Madhya Pradesh High Court.[83]

It may be noted that Section 362 does not control the power of the Supreme Court to review' its own judgment or order. This power is

77. *Rajui* v. *State of* u,P., 1982 Cri Lj 635, 636-37 (AH).
78. *See supra*, para. 16.16 for the contents of S. 348.
79. *Ajit Singh* v. *State of Punjab*, 1982 Cri Lj 1215, *izx*~ (P&H) (FB); *Sooraj Deui* v. *Pyare Lai*, {1981) 1 SCC 500: 1981 SCC (Cri) 188, 1:90-91.: 1981 Cri Lj 2.96, 298: *Raju i* v. *State of U.P.*, 1982 Cri Lj 635, 637 (AH}; *Sohan Lai* v.
80. *Sooraj Devi* v. *Pyare Lai*, (1981) 1 SCC 500:1981 SCC (C ri) 188. 190: 1981 Cri Lj 296, 298.
81. *Ajit Singh* v. *State of Punjab*, 1982 Cri Lj 1215, 1218 (P&H) {FB}; *Kapoor Singh* v. *State of Punjab*, 1988 Cri Lj 636 (P&H).
82. V. *Venkatesivarlu* v. *State of A.P.*, 1987 Cri Lj 1621 (AP).
83. *Shersingh* v. *State of M.P.*, 1989 Cri Lj 632 (MP).

conferred on the Supreme Court by Article 137 of the Constitution which reads as follows:

> 137. *Review of judgments or orders by the Supreme Court*.—Subjecr to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

23.18 Copy of judgment to be given to the accused and some others under certain circumstances

In this connection Section 363 provides as follows:

Copy of judgment to be given to the

> 363. (1} When the accused is sentenced to imprisonment, a copy of the judgment shall, immediately after the pronouncement of the judgment, be given to him free of cost.
>
> (2) On the application of the accused, a certified copy of the judgment, or when he so desires, a translation in his own language if practicable or in the language of the Court, shall be given to him without delay, and such copy shall, in every case where the judgment is appealable by the accused, be given free of cost:
>
> Provided that where a sentence of death is passed or confirmed by the High Court, a certified copy of the judgment shall be immediately given to the accused free of cost whether or not he applies for the same.
>
> (3) The provisions of sub-section (2) shall apply in relation to an order under Section 117 as they apply in relation to a judgment which is appealable by the accused.
>
> {4) When the accused is sentenced to death by any Court and an appeal lies from such judgment as of right, the Court shall inform him of the period within which, if he wishes to appeal, his appeal should be preferred.
>
> (5) Save as otherwise provided in sub-section (2), any person affecred by a judgment or order passed by a Criminal Court shall, on an application made in this behalf and on payment of the prescribed charges, be given a copy of such judgment or order or of any deposition or other part of the record:
>
> Provided that the Court may, if it thinks fit for some special reason, give it to him free of cost.
>
> (6) The High Court may, by rules, provide for the grant of copies of any judgment or order of a Criminal Court to any person who is not affected by a judgment or order, on payment, by such person, of such fees, and subject to such conditions, as the High Court may, by such rules, provide.

When any person is affected by a judgment or order passed by a criminal court, then on an application made in this behalf under Section 363(5) and on payment of prescribed charges, a copy of the order, deposition or any other part of the record has to be given to him irrespective of the fact whether he has appeared in court or not.[84]

84. *Shree Lai Sarof* v. *State of Bihar,* 1979 Cri Lj 895, 89

23.19

Translation of judgment when to be kept The original judgment is required to be filed with the record of the proceedings and where the original is recorded in a language different from that of the court and the accused so requires, a translation thereof into the language of the court shall be added to such record* [S. 364]

23.20

Court of Session to send copy of finding and sentence to District Magistrate In cases tried by the Court of Session or a Chief Judicial Magistrate, the court or such Magistrate, as the case may be, shall forward a copy of its or his finding and sentence (if any) to the District Magistrate within whose local jurisdiction the trial was held. [S. 365]

The purpose of sending a copy of the judgment as mentioned above is to enable the District Magistrate to be posted with information about serious offences.

Chapter 24

Review Procedures: Appeals

Object and scope of the chapter **24.1**

Human judgment is not infallible. Despite all the provisions for ensuring a fair trial and a just decision, mistakes are possible and errors cannot be ruled out. The Code therefore provides for "appeals" and "revisions" and thereby enables the superior courts to review and correct the decisions of the lower courts. Apart from its being a corrective device, the review- procedure serves another important purpose. The very fact that the decision of the lower court is duly scrutinized by a superior court in "appeal" or "revision" gives certain satisfaction to the party "aggrieved" by that decision. The review- of the case by superior courts, in a way, assures the aggrieved party that all reasonable efforts have been made to reach a just decision free from plausible errors, prejudice and mistakes. Review procedures are therefore importantly useful to inspire in the public mind a better confidence in the administration of criminal justice.

> The Supreme Court has observed:
>
> One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with loss of liberty, is basic to civilized jurisprudence. It is integral to *fair* procedure, natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. In short, a first appeal ... as provided hi the Criminal Procedure Code, manifests this value upheld in Article 2.I.[1]

Appeal is one oi: the two important review- procedures, and the present chapter attempts to discuss ail its aspects. The next chapter deals with "revision".

1. *M.H. Haskot* v. *State of Maharashtra,* (1978) 3 SCC 544: 1978 SCC (Cri) 46S, 476: 197S Cri Lf 167S.

An appeal is a complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse.[2]

An appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself.[3]

The appeal as a corrective procedure would obviously be far less relevant in cases where the chances of error in the judgment of the trial court are very remote. Further, the review of the case in appeal means additional time and expense for the final disposal of the case. Therefore in petty cases where the possible error in the decision of the lower court is more likely to be of insignificant nature, it would be inexpedient to allow appeals in such cases. These considerations have found expression in the provisions of the Code. In cases where the accused has been convicted on his own plea of guilty, the Code justifiably disallows any appeal against the order of conviction, but fairly permits under certain circumstances an appeal as to the extent or legality of the sentence passed on the accused person. It will further be seen that the Code does not *generally* favour a second appeal.

The chapter would consider the circumstances in which appeals can be filed against the orders of convictions or of acquittals and also the conditions in which the government can appeal on the ground of inadequacy of the sentence passed on the accused person. The chapter further deals with the form of appeal, the procedure for its filing, the manner in which it is heard, the powers of the appellate court in disposing of an appeal, the abatement of appeal under certain circumstances, and other ancillary matters.

A right of appeal carries with it a right of rehearing on law as also on facts. Generally there is no right of hearing on facts or appreciation of evidence in a revision.[4] A rehearing of the case could, however, be ordered in exercise of revisional power.[5]

Provisions regarding appeals from orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour are contained in Section 373, but they can be more conveniently discussed along with the main provisions relating to security proceedings. These would be discussed later in Chapter 28.

24.2 No appeal in certain cases

(1) *No appeal unless provided by law*.—Section 372 lays down the general principle that no appeal shall lie from any judgment or order of a

2. *Black's Law Dictionary* (4th Edn.) 12.4.
3. *Diirga Shankar Mehta* v. *Ragbumj Singh*, AIR
4. *State of Kerala* v. *Sebastian*, 1983 Cri Lj 416, 418
5. *T.V. Hameed,re*, 19S6 Cri LJ 1001 (Ker).

criminal court except as provided by the Code or by any other law which authorises an appeal. It is, therefore, necessary to bear in mind that an appeal is a creature of statute and that there is no inherent right of appeal.[6] [7] [8]

Act 5 of 2009 inserted a proviso to Section 372 with effect from 31 December 2009. It gives a right to the victim to file an appeal in the High Court against any order of a criminal court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation/ It confers a right only on a victim and also does not envisage an appeal against an inadequate sentence.

The proviso has generated a lot of debate among the High Courts.[8] Different High Courts have come up with disparate interpretations. It is argued that this right of appeal is subject to the leave of High Court as in other cases under Section 378. This view is being countered by the argument that this right of the victim is absolute as otherwise the legislature could have made provision by amending Section 378 suitably. Having regard to the history of legislation and the case law it is strongly felt that the right of victim limited to three categories is intended to be absolute and that it is in consonance with the aim of the legislature to protect the victims. In this connection Section 357-A of the Code extending the victims[5] right of compensation may also be kept in view.

As will be seen later, this chapter provides for appeals in certain cases as mentioned in Sections 373, 374, 377, 378, 379, 380. Apart from these general sections, there are also other provisions in the Code giving the right of appeal in some specific areas. For example, Sections 86, 237(7), 250(6), 341, 351(1), 449 etc.[9]

(2) *No appeal in petty cases*.—Section 376 provides that there shall be no appeal by a convicted person in any of the following cases, namely:

(a) where a High Court passes only a sentence of imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees, or of both such imprisonment and fine;

(h) where a Court of Session or a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees, or of both such imprisonment and fine;

6. ***See,*** observations of the Supreme Court in ***Akatu Ahir v. Ramdea Ram,*** {1573) x SCC 583: 1973 SCC (Cri) 903. 905: 1973 Cri Lj 1404. 1405; ***National Commission for Women*** v. ***State of Delhi,*** (2010) iz SCC 599: (xcii) 1 SCC (Cri.) 774.
7. See, Nee-raj 7 ':wan. "Legislative Framework and judicial Response co the Victim's Right of Appeal'", (201.3) 9 SCC j-13.
8. See, ***Bhtkhahha: Slotibhai Chavda*** v. ***State of Gujarat,*** zoxo Cri. Lj 3325 (Guj); ***Guru Prasad Yadav*** v. ***State of Bihar,*** Criminal Appeal (DR) No. 582 of 2011, order dated 2-S-2011 (Pat);. ***Ram Kaur*** v. ***Jaghir Singh,*** {2010) 3 RCR (Cri) 391 (P&H); ***Balasaheb Rangnatb Khade*** v. ***Stale of Maharashtra,*** Criminal Appeal No. 991 of 2011, order dated 27-4-2012 (Bom); ***Jagmohan Bhola*** v. ***Dilbagh Rai Bhola,*** (zorr) 2 JCC 777 (Del!; ***L.P. Sharma*** v. ***State of Tripura,*** (2012) 6 Gau LR 775, etc.
9. ***See supra,*** paras'5.14, 19.8, 20.12, 10.5(2), id. 19, 12.13.

[c where a Magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees*, or

{d) where, in a case tried summarily, a Magistrate empowered to act under Section 260'° passes only a sentence of fine not exceeding two hundred rupees.

However, the proviso to Section 376 explains that an appeal may be brought against the abovementioned non-appealable sentence if any other punishment is combined with it. But it is further explained that such sentence shall not be so appealable merely on the ground:

(z) that the person convicted is ordered to furnish security to keep the peace; or

(ti) that a direction for imprisonment in default of payment of fine is included in the sentence; or

(Hi) that more than one sentence of fine is passed in the case, if the total amount of fine imposed does nor exceed the amount hereinbefore specified in respect of the case.

It may be recalled here that according to Section 31(3}, for the purpose of appeal by a convicted person, the aggregate of the consecutive sentences of imprisonment passed against him at one trial shall be deemed to be a single sentence.[11 12 13 14]

(3) *No appeal where the accused is convicted on his plea of guilty,*—Where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal

(a) if the conviction is by a High Court; or

(P) it the conviction is by a Court of Session, metropolitan Magistrate or Magistrate of the first or second class, except as to the extent or legality of the sentence. [S. 375]

The rationale behind the above Section 375 is that a person who deliberately pleads guilty cannot be aggrieved by being convicted. When a person is convicted by *any* court on the basis of his own plea of guilty, he cannot and should not have any grouse against the conviction and hence is not entitled to appeal from such a conviction. However, if the plea of guilty is not a *real* one and Is obtained by trickery, it is not a plea of guilty tor the purposes of the above ruled² It is only when there is a genuine plea of guilty made freely and voluntarily mat the bar under Section 375 would apply/³ In *Thippaswamyv. State of Karnataka*'% the Supreme Court observed that it would be a violation of Article 21 of the Constitution to

1°. *Set* supra,* para. 20.13.

If. *See supra,* para. is.;).

12. *Rrafulla Kumar Roy Emperor,* (1943) 45 Cri Lj 517, 5.18: AIR 1944 Cal 72°.

13. *State of Kerala* v. *Gopmath Rillal*, 198° Cri U (NOC) 39: -LR (2978) z Ker 267.

14. (1983; r SCC 194: 1983 SCC (Cri) *160:* 19S3 Cri Lj 1.2.71. *See also,* discussions *in Brijial Amaroansh:* v. *State of Maharashtra, zoop* Cri LJ 87

induce or lead an accused to plead guilty under a promise or assurance that lie would be let off lightly and then in appeal or revision, to enhance the sentence. A person, by pleading guilty, does not commit himself to accept the punishment that would he passed against him irrespective of its nature and legality. Therefore, he is not denied the right to challenge the extent or legality of the sentence. However, this is subject to one exception. That is, where a High Court convicts and sentences a person on a plea of guilty, an appeal is not allowed even as regards the extent or legality of the sentence, because it can hardly be contemplated that the judgment of a High Court would suffer from a serious infirmity in respect of the extent or legality of the sentenced[5]

Appeals from convictions

24.3

(i) *Appeal to the Supreme Court:*

[a) Subject to the restrictions on appeals as mentioned in para. 24.1 above, any person convicted "on a trial held by" a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court. [S. 374(1}] Since such trials are extremely rare, it was felt that, in the interests of finality to the proceedings appeal should lie direct to the Supreme Court and not to another bench of the same High CourtA *ih)* Where the High Court has, on appeal, reversed an order of acquittal of an accused person and convicted and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more, he may appeal as of right to the Supreme Court. [S. 379] By this Section 579 the provisions of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 have been incorporated in the Code.

{c) The Constitution provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. [Art. 132(1)] Further, where the High Court has refused to give such a certificate the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant special leave to appeal from such judgment, decree or final order. [Art. 132(2)] XT here such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground. [Art. 132(3)] [15] [16]

15. *See.*, 43st Report, p. 159, p?_ra.
16. *Sec*, 4rst Report., p. 2.59, pars.

(d) Article 134(1} of the Constitution, inter alia provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, if the High Court:

(i) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or *(it)* certifies that the case is a fit one for appeal to the Supreme Court.

(e) Article 136(1} of the Constitution provides that the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal.

However the above rule shall not apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces. [Art. 136(2)]

It has been reiterated by the Supreme Court that in cases which do not come under clauses *(a)* and *(h)* of Article 134(1) or under the Act of 1970 or Section 379 of the Code an appeal does not lie *as of right* to the Supreme Court against any order of conviction by the High Court. In such cases appeal will lie only if a certificate is granted by the High Court under sub-clause (c) of Article 134(1) certifying that the case is fit one for appeal to the Supreme Court or by way of special leave under Article 136 when the certificate is refused by the High Court.[17]

{2} *Appeal to the High Court*.—Subject to the restrictions on appeals as mentioned in para. 24.2 above, any person convicted on a trial held by a Sessions judge or an Additional Sessions judge or on a trial held by any other court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial may appeal to the High Court. [S. 374(2}] And in that case the judgment can be stayed suspended pending appeal.[18]

In a case where the trial is held by an Assistant Sessions judge and during the trial the judge is invested with the powers of the Additional Sessions Judge or of the Sessions Judge, a question might arise as to whether an appeal from an order of conviction in such a trial shall lie to the High Court. Courts are not unanimous on this point. In a case where the Assistant Sessions judge, after he had recorded the evidence in court and heard the arguments but before he had written and delivered the

17, ***Chandra Mohan Tiwari*** v. ***State of*** ALL., (1992.) 2 SCC 105, 113-14: 1992 SCC (Cri) 252: 1992 Cri LJ 1091. Also see, ***Ganga Kumar Srivasiava*** v. ***State of Bihar,*** {2005} ***6*** SCC 211: 2005 SCC {Cri} 1424: 2005 Cri LJ 3454; ***State of V.P.*** v. ***Guru Charan,*** (2010} 3

18. ***V. Sundararami Reddi*** v. ***State,*** 1990 Cri LJ 167 (AH); S.M. ***Malik*** v. ***State,*** 1990 Cri LJ 1919 {Dei}.

judgment was invested with the powers of an Additional Sessions Judge, the Allahabad High Court held that an appeal from conviction in the case would lie to the Sessions Judge and not to the High Court as the accused was convicted "on a trial held by" an Assistant Sessions Judge and not by an Additional Sessions Judge. The fact that the Assistant Sessions Judge had become the Additional Sessions Judge when he wrote and delivered the judgment would not affect that position.[19]

In a case tried and acquitted by the Magistrates' court on appeal by the State, the High Court recorded conviction and sent the case to the trial court for awarding sentence. The accused's appeal of sentence by the trial court, to the Sessions Court was held not maintainable as the "conviction part" was non-appealable to the Sessions Court.[20]

(3) *Appeal to the Court of Session.*—Subject to the restrictions on appeals as mentioned in para. 24.2, and also subject to the provisions of Section 374(2) as mentioned in para. 24.3(2) above, any person,

(a) convicted on a trial by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the First Class, or of the Second Class, or

(b) sentenced under Section 325[21] [22] [23], or

(c) in respect of whom an order has been made or a sentence has been passed under Section 360 by any Magistrate[22] [23],

may appeal to the Court of Session. [S. 374(3)]

(4) *Special right of appeal in certain cases.*—Notwithstanding anything contained in this chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal. [S. 380]

Appeal by government against sentence

Before Section 377 dealing with such appeals was enacted, it was considered somewhat unsatisfactory to invoke the revisional powers of the High Court for correcting any error in sentencing. Considering the frequent occurrence of inadequate sentences, there seemed no reason why the State Government should not be able to appeal *against* an inadequate *sentence.*[25] Section 377 therefore provides as follows:

377. (1) Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High

24.4

Appeal by the State Government against sentence

19. *Baksbt Ram* v. *Emperor*, (1338} 39 Cri LJ 345:
20. C. *Gopinatban* v. *Krishnan Ayyappan*, 1991 Cri
21. For the text of S. 315, *see supra*, para. 14.3(a).
22. For the text of S. 560, *see supra*, para. 23.5(13).
23. *See*, 41st Report, p. 264, para. 31.21.

Court, direct the Public Prosecutor to present [24][an appeal against the sentence on the ground of its inadequacy—

[a) to the Court of Session, if the sentence is passed by the Magistrate;

and

(b) to the High Court, if the sentence is passed by any other Court.]

(2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 {25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may [25][also] direct the Public Prosecutor to present [26][an appeal against the sentence on the ground of its inadequacy—

(a) to the Court of Session, if the sentence is passed by the Magistrate;

and *: {b}* to the High Court, if the sentence is passed by any other Court;].

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, [27] [28] [29] [30][the Court of Session or, as the case may be], the High

! Court

! shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence.

Earlier an appeal for enhancement of sentence on the ground of its inadequacy could only be entertained by the High Court. However, as per the present scheme of Section 377 an appeal on the ground of inadequacy of sentence can also be entertained by the Court of Sessions in certain circumstances. An appeal for enhancement of a sentence passed by a Magistrate would now lie to the Sessions Court. This will not only make it easier for the administration to prefer appeals against unduly lenient sentences by Magistrates but will also deter the latter from passing sentences that are grossly: inadequate.

The right to appeal against inadequacy of the sentence has been given only to-the:State and not to the complainant or any other person. However that does not mean that the complainant or any other person cannot move the High Court {or Court of Session) In revision for this purpose. The High Court or the Court or Session in an appropriate case may, in exercise of its

24. *Subs.* by Act45 of 2005, .S,- 31(a). (vv.e.f. 2.3-6-2.006}.
25. *bis.* by CrPC (A'mendmer.c) Act, 1978, S. 2,9.
26. *Subs,* by Act 25 of 2005, S. 31 (a) pv.e.r. 23-6-2006).
27. *Ins.* by Act 25 of 2005, S. 3i(&).(w,e,f. 23-6-2006).
28. *Nadir Khan* v. *State (Delhi Admn(1975)* 2 SCC 406: 1975 SCC (Cri) 622, 624: 1976 Cri Lj 1721, 1722; *Bachan Singh* v. *State of Punjab.* (1979) 4 SCC 754: 1980 SCC (Cri) 174: 1980 Cri LJ 211; *Food Inspector* v. *K.S. Raphael,* 1981 Cri LJ 1149 (Kant); *Prabbitdai Cbhaganlal v. Babubhai Virabhai Miseria,* 1977 Cri Lj 1666 (Guj); *Eknath Shankarmo Mukkawar* v. *State of Maharashtra,* (1977) 3 SCC 25: 1977 SCC (Cri) 410, 413: 1977 Cri Lj 964; *State* v. *Babaji Sahoo,* 1977 Cri Lj 1591 (Or;).
29. For the text of S. 399, *see infra,* para. 25.6.
30. For the text of S. 401, *see infra,* para. 25.8.

when read with Section 3 86*{c}{iii)*[n] are dearly supplemental to those under Section 377. The effect of reading Sections 377, 386 and 401 may however be noted. While in the exercise of the revisional jurisdiction the High Court or the Court of Session is competent to enhance the sentence, the accused has to be given an opportunity of being heard not only against the enhancement of the sentence but also against the conviction itself.[32]

In a case where both the appeal and a petition for enhancement of sentence were heard by the High Court it was ruled that there was no need to hear the appellant as he could be permitted to lead evidence while hearing the appeal. Moreover, the court noted, the appellant have had opportunity of being heard under Section 2.35(2,} at the time of conviction.[33]

While the accused in an appeal under Section 377 can show that he is innocent of the offence, the prosecution is not entitled to show that he is guilty of a graver offence and on that basis the sentence should be enhanced.

The prosecution will only be able to urge that the sentence is inadequate on the charge as found or even on an altered less grave charge.[34]

In a case where the conviction is recorded by the trial court but instead of awarding sentence of imprisonment the convict is released on probation under the provisions of the relevant special law then it is a case where no sentence at all has been awarded and as such the provisions of Section 377(1) are not attracted.[35]

The High Court or the court of session, while exercising the power of enhancing the sentence passed by the trial court must counter by clear ratiocination the reasons given by the trial court in passing the sentence.[3"]

Appeal against the order of acquittal 24.5

In this connection Section 378 provides as follows:

Appeal in case of acquittal

378. [37][(1) Save as otherwise provided in sub-section (a), and subject to the provisions of sub-sections (3) and (5),—

{a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence:

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court [not being [51]

51. For S. 386(r)(7a), *sec infra,* para. 24.12(4).

32. *Food Inspector* v. *K.S. Raphael,* 1981 Cri Lj 1149, 1154 (Kant); see also, *U.J.S. Chopra* v. *State of Bombay,* 1955 Cri LJ 1410, 1418: AIR 1955 $C 653.
33. *Sirajkhan Buddinkhan* v. *State of Gujarat,* 1994 Cri LJ 1502 (Guj).
34. *Eknath Shankarrao Mukkawar* v. *State of Maharashtra,* {1977) 3 $CC 25: 1977 SCC (Cri) 410, 416: 1977 Cri LJ 964.
35. *State of U.P.* v, *Nand Kishore Misra,* 1991 Supp (2) SCC 473: 1991 Cri LJ 456.
36. *Lingala Vijay Kumar* v. *Public Prosecutor,* {1978) 4 SCC 196: 1978 SCC (Cri) 579, 583: 197S Cri Lj 1527.
37. *Subs,* by Act 25 of 2003, S. 32(f) (w.e.f. 25-6-2006}.

an order under clause *(a))* or an order of acquittal passed by the Court of Session in revision],

(a) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [3S][the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of subsection {3), also direct the Public Prosecutor to present an appeal—

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

{.*b)* to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause {a}] or an order of acquittal passed by the Court of Session in revision.]

{3) No appeal [38] [39][to the High Court] under sub-section (1) or sub-section (2} shall be entertained except with the leave of the High Court.

(4} If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5} No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

Appeal against an order of acquittal is an extraordinary remedy. Where the initial presumption of innocence in favour of the accused has been duly vindicated by a decision of a competent court, an appeal against such a decision of acquittal means putting the interests of the accused once again in serious jeopardy. Therefore the restrictions on the preferring of an appeal against acquittal as envisaged by Section 378 are intended to safeguard the interests of the accused person and to save him from personal vindictiveness. According to the first four sub-sections of Section 378, an appeal against an order of acquittal can be preferred only *i)* by the government, and *ii)* in a case instituted upon complaint, by the government as well as by the complainant. *Secondly*, the right of such appeal can be exercised only after obtaining the leave of the High Court. *Thirdly*, whether the order of acquittal is passed by any Magistrate or by any Sessions Judge, and whether the offence of which the accused is acquitted is a major or a minor offence, the appeal in every case of such acquittal could be made only to the High Court. *Fourthly*, according to [38] [39]

38. *Subs*, by Act 25 of 2005, S. *3z(ii)* (w.e.f. 23-6-2006}.
39. *Ins.* by Act 25 of 2005, S. 31 *(lit).*

sub-section *(6)* an appeal by the State under sub-section (x) or sub-sec- tion (2.) is barred in case the private complainant has failed to obtain special leave to appeal under sub-section (4).

Fifthly, the application for grant of leave to appeal must be filed within the time prescribed by sub-section (5); and the appeal must be filed within the period of limitation prescribed by Article 114 of the Schedule of the Limitation Act, 1963.

The methodology of filing an appeal lies with the state, and the High Court has no authority or jurisdiction to issue a directive to the state to file appeals against persons acquitted.[40]

Section 378 deals with appeals in cases of acquittals. It does not come into play against an order of discharge.[41] Nor does it apply to cases where the proceedings are dropped as being found to be barred by the prescribed period of limitation or on account of lack of jurisdiction. An order of acquittal contemplates the complete exoneration of the accused of the offence with which he was charged.

In an appeal against acquittal a court has to remind itself of set of cardinal rules. They are that

(i) there is a presumption of innocence in favour of the accused which has been strengthened by the acquittal of the accused by the trial court:

{ii) if two views are possible, a view favourable to the accused should be taken;

(in) the trial judge had the advantage of looking at the demeanour of the witnesses, and

(w) the accused is entitled to a reasonable benefit of doubt, a doubt which a thinking man will reasonably, honestly and consciously entertain.[42] The court can interfere with the order of acquittal only when:

(/'} the appreciation of evidence by the trial court is perverse or the conclusion drawn by it cannot be drawn on any view of the evidence;

{ii) where the application of law is improperly done;

{Hi) where there is substantial omission to consider the evidence existing on record;

(iv) the view taken by the acquitting court is impermissible on the evidence on record; or

40. *Dwarka Dass* v. *State of*
41. *Alim* v. *Tauftq,* 19S2 Cri LJ
42. *State* v. *Vazir Ha kki,* 2005

(v) if the order of acquittal is allowed to stand it will result in the miscarriage of justice.[43]

The appellate court should seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above questions in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, thar the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusion.[44]

in the matter of preferring appeals against acquittals, appeals by the State Government or the Central Government have been treated differ- endy from appeals by a complainant. This is obvious from the wording of sub-sections (3) and {4) of Section 378. In the case of an appeal preferred by the State Government or the Central Government under sub-section (i) or sub-section (2.) of Section 378, the Code does not contemplate the making of an application for leave under sub-section [3} thereof, while in the case of an appeal by a complainant, the making of an application for grant of "special leave" is a condition precedent .tor the grant of "special leave" to a complainant. Therefore the State Government or the Central Government may, while preferring an appeal against acquittal under Section 378(1) or Section 378(2), incorporate a prayer in the memorandum of appeal for grant of leave under Section 378(3) or make a separate application for grant of leave under Section 378(3), but the making of such an application is not a condition precedent for a State appeal.[45*] It is not necessary as a matter of law, that an application for leave to entertain the appeal should be lodged first and only after grant of leave by the High Court an appeal may be preferred against an order of acquittal.[44] However, while refusing leave to appeal against an order of acquittal, the High Court is required to adduce sufficient reasons for the same.[47]

Under Article 144, Limitation Act, in an appeal from an order of acquittal by the State, the period of limitation is 90 days from the date or the order appealed from; whereas in an appeal from an order of acquit- tad in any case Instituted upon complaint, the period Is 30 days from the date of the grant of special leave. Thus there is a clear distinction

43. *State of Maharashtra V.*
44. *Ranissh Babuial* Dos/.'? v. *State of Gujarat,* t.1.99A) 9 SCC 2.2,5:
45. ***State ofM,P.*** v. ***Deaadas,*** i.:t9S2.) ***1.*** SCC 552: 2982 *997* 0
4.0 ***Saga Ram*** v. ***State of Rajasthan,*** (2.006; 8 SCC 69.1: (2007) ***1*** SCC

between the two types of appeals with regard to terminus a quo under Article 114. It is, therefore, not necessary to wait until the grant of leave by the High Court to present a memorandum of appeal against acquittal at the instance of the State. Thus, an appeal can be filed by the State within 90 days from the date of the order of acquittal and a prayer may be included in that appeal for entertaining the appeal under Section 378(3). If the leave sought for is not granted by the High Court, the appeal is not entertained and stands dismissed.[4*]

It may further be noted that even if the State had in its capacity as the complainant conducted the proceedings in the trial court, yet it has an independent right as the State to prefer an appeal under Section 378(1). This right of the State cannot be trammelled by the provisions contained in sub-sections (4) and (5) of Section 378. This is a right which is independent of the right given to the complainant, whether the complainant in the trial court was the State or a public servant or any other private individual. The question as to the authority entitled to make appeals depends on the authority which initiates prosecution. The State of Bihar was not permitted to appeal against the acquittal in the case initiated by the CBL - The wide amplitude of phraseology used in Section 378(1) clearly shows that the State has a right to approach the High Court to challenge an order of acquittal passed in *any case* in the lower court. One restriction that is placed upon this right of appeal is that leave c:t the High Court under Section 378(3) has to be obtained. The other restriction is contained in Section 378(6).[5°] The power to go in. appeal against an order of acquittal should ordinarily be used, oy the government in such cases only where there appears to be a serious miscarriage of justice. The government can review or recall its decision under Section 378 to prefer an appeal against an order of acquittal before the appeal is actually presented in the High Court hut not thereafter. - The provisions regarding *the* leave of the High. Court to hie an appeal against acquittal were found desirable and expedient agamst the somewhat arbitrary exercise of the executive power of the government to hie such appeals,.[53] Under sub-section (3) the High Court has got full discretion to grant or not to grant leave to appeal against acquittal. But quite [43]

43. *Slate of Rajasthan* v. *Ramdcen.* (5977) 2. SCC 630: 1977 SCO (Cri) 393, 396: 1977 Cn Lj *997*49. *Lain Vraszd Ycdav* V. *State of Bihar., [zoio]* 5 SCC 1: (2.OIo) *2.* SCC (Cri) i - n : *zoso* Cri *l A* 24 27.

50. *Sta te of Maharashtra* V. *Decpckand Khuskalchsmd ja in.*: 1983 Cri Lj 561, 567 (Rom); see also. ***Khemraj*** v. ***State of*** ALP., (1976; .T SCC 385: 1977 SCC (Cri) 3,

5.i. *King hmperor* v. *Ganp&ti,* 1943 Cri Lj *766, ~6j:* AIR 2944 I9ag 136: *Public Prosecutor* v. *Mayandi Nadar,* (1933) 34 Cri Lj 394.8(1): AIR 1933 Mad 230: *Legal Remembrancer* v. *Kanma Baistobi.* ILR. (1894) 22 Cal *164.* 170; but see, *Slats of Orissa* v_ *Nirupama Panda.* 1989 Cri IJ *621*

obviously this discretion is to be used judicially and not arbitrarily. Leave to appeal should not be refused without assigning reasons.[54]

According to Section 378(1}, the appeal by the State against the order of acquittal is to be presented in the High Court by the Public Prosecutor upon the direction of the State Government. The object of this provision seems to be that the State should associate the Public Prosecutor in the matter of preferring an appeal against acquittal. Where there is a Public Prosecutor but the State has not associated him in preferring the appeal, the act of filing the appeal will be invalid. Section 378 is thus mandatory. Even though Section 382 allows the appeal to be presented in the form of a perition by the appellant or his lawyer, that section does not override the special requirement of Section 37S in respect of an appeal by the State. However, in a situation where it is impossible to have a Public Prosecutor for presenting an appeal on behalf of the State, it would be legitimate to invoke the maxim *lex non cogit ad impossihilia* which means dispensing performance of what is prescribed when performance of it is impossible.[55]

For the purposes of Section 378(1), the Public Prosecutor is a person appointed as such under Section 24(1).[56] It has been held that simply because the rules framed by the State Government under Article 165 provided that the Advocate-General shall represent the government in the High Court in important civil and criminal proceedings, it will not give him the status and clothe him with the powers of a Public Prosecutor of the High Court as appointed under Section 24(1) of the Code.[57]

The Public Prosecutor, according to Section 378(1), is to present the appeal against acquittal only under the direction of the State Government. He has no power to suo motu file such an appeal. In the absence of any direction from the government, the appeal filed by him would be incompetent. A proposal of the Gujarat Government to get the appeals against acquittals to be vetted by the District Magistrates came to be adversely commented upon by the Gujarat High Court. However, on appeal by the State, the Supreme Court ordered that a copy of the proposal for Fling appeals against acquittals should be sent to the District Magistrate though it need not be necessary for the Law Department to wait for their

54, *State of Maharashtra* v. *Vithal Rao Pritirao Chaw an*, (19S1) 4 SCC 129: 1981 SCC (Cri) 807, 808: 1982 Cri Lj 1743(1); *Reerna Aggarwal* v. *Anupam*, (2004} 3 SCC 199: 2004 SCC (Cri) 699:

55. *J.M. .Almeida n.Statie*, 1980 Cri Lj 145, X <50

56. For S. 24(1), *see supra*,

57, *State of Kerala v.*

comments for filing appeals.[58] An ex-post sanction/direction granted by the government after the expiry of limitation for appeal cannot cure the defect/[9] Because, the ex post facto sanction if permitted would deprive the accused of a valuable right for the maintenance of the order of acquittal.

It is interesting to note that accepting the letter of the grandfather of the victim as petition an acquittal recorded by a Sessions Court came to be reviewed and set aside by the High Court which remanded the case to pass a fresh judgment after hearing or if need be, to hold a retrial. The Supreme Court okayed the orders of the High Court though the acquittal was challenged by the grandfather who was not the de facto complainant in the [60] case.

The words "any case instituted upon complaint" in sub-section {4} mean only such cases where a complaint is filed and cognizance of the offence is taken by the Magistrate upon such complaint. If the Magistrate after receiving the complaint refers the same to the police without taking cognizance and subsequently cognizance is taken on the police report, the case is not one "instituted upon complaint" and is not covered by sub-section (4) .[61] The complainant in such a case is de facto complainant. Though he may be examined as witness, he will have no right to challenge the acquittal by way of appeal.[62] However, the de facto complainant may file an application under Section 401 of the Code for revision of the order of acquittal/"

Sub-section (5) prescribes a period of limitation of 60 days for making an application for grant of special leave to appeal against an order of acquittal at the instance of a complainant. In quite a few cases prosecutions are launched by means of complaints by public servants, such as prosecutions for offences under some special laws. In such cases, the administrative procedure for taking a decision in the matter takes quite a long time and in some cases such procedure is not completed within 60 days. In consequence there might be miscarriage of justice. Most of these special laws require to be enforced strictly with a view to put a stop to various types of anti-social activities and if wrong acquittals are not appealed against, there would be an adverse effect on the enforcement of such laws. It was, therefore, considered desirable to extend the period of limitation to six months whenever the complainant was a public servant.

5$, *State of Gujarat* v. *Ratilal Laljibhai Tandol*, {1997) 7 SCC 227: 1997 SCC (Cri) 104659. *State of Punjab* v, *Mobinder Singh*, 1983 Cri LJ 466. 469-70 {P&H).

60. *Kaptan Singh* v. *State of M.P.*, {1997) 6 SCC 185: 1997 SCC (Cri) 870.

61. *Sk. Osman Gani* v. *Baramdeo Singh*, (1959) 60 Cri LJ 311, 315: AIR 1959 Cal 145; *Kartar Singh* v. *Bajrangi Lall*, {1964) 1 Cri LJ 213: AIR 1964 Pat 61, 62; *K. Damodaran* v. *V.K. Sippi*, 1960 Cri LJ 1600: AIR 1960 Ker 389; *Hucbappa* v. *Venkataswami*, 1960 Cri LJ 964: AIR 1960 Mys 172; see also, *Hasimuddin Mondal* v. *Golam Mahebub*, 1988 Cri LJ 1900 (Cai).

62. *Abamadkutty* v. *Johnson*, 1989 Cri LJ 2462 (Ker).

63. *Annapurna* v. *State.* 2003 Cri LJ 2665 (Kant).

An appeal from an order of acquittal in a case instituted upon a complaint must be presented within.30 days from the date of grant of special leave to appeal as provided by clause *(b)* of Article 114, Limitation Act.

A party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstances arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute such sufficient cause.[64]

In a case where the accused was acquitted according to the then settled law, but subsequent to the order of acquittal the settled law was altered and unsettled by the view taken by the Supreme Court, the complainant was not granted special leave to appeal from the order of acquittal. Because unsettling the settled cases and converting acquittals into convictions was not considered conducive to justice.[65]

It has been observed that if a convict's appeal is out of time it is the practice of the High Court to condone the delay as no right could be said to vest in the State to have the conviction of an innocent person upheld, but if the State itself is negligent in the presentation of an appeal against acquittal a very clear right comes to vest in the accused person and he is entitled to claim that, save in exceptional circumstances, delay in filing the appeal should not be condoned.[66]

It has been opined that when the State has not appealed against acquittal, the complainant could invoke revisional jurisdiction of the Sessions Court.[67]

24.6 Petition of appeal and its presentation

(1) Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the court to which it is presented otherwise directs) be accompanied by a copy or the judgment or order appealed against. [S. 38a]

(2) Ii the appellant is in jail he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate court. [S. 383]

The appeals presented to jail authorities under Section 383 are usually called “jail appeals”.

64. *Ajit Singh Thakur Singh* v. *State of Gujarat*,
65. *MCD* v. *Madan Laf* 1979
66. *State* v. *Ditta Ram Pritam Dass*, 1955
67. *Niranjan Kumar Das*

It is obvious that the right vested in the appellant is to present one appeal although there are different methods of presenting it, and strictly speaking, if one method is availed of and one appeal either under Section 382, or Section 383 is presented, no other appeal can be lodged.[68] In practice, however, it appears that frequently both appeals are presented and are dealt with as two appeals about the same matter. Thus, an appellant in jail sends an appeal through the jail superintendent and later a pleader instructed on his behalf presents another appeal against the same order.

No practical difficulty arises if, as is normally the case, both the appeals are dealt with at the same time. Sometimes, however, through oversight, one appeal is disposed of and then the other appeal comes up for disposal causing considerable embarrassment to the appellate court.[69] In. order to meet such a situation fairly, specific provisions have been made in Section.

384 which whll be discussed later in para. 24.8.

Where several persons are convicted at one trial, all of them or some of them can present one joint appeal.[70 71 72]

The rule contained in Section 382 is a technical rule, it requires an aggrieved person filing an appeal to attach a copy of the judgment appealed against. The purpose of this rule is to give the appellate court an initial idea of what the case is about at the time of passing interim orders.

The provision should not be read as creating a disability against a person from filing an appeal.[71 72]

Though there is no provision in the Code which requires that the petition of appeal should specify the grounds on which the appeal is based, yet the memorandum of appeal should contain a succinct statement of the grounds on which the appellant proposes to support the appeal. '[2]

Hearing of appeals in Court of Session **24.7**

For proper distribution of the appellate work in the Court of Session,
Section 381 provides as follows:

381. ri) Subject to the provisions of sub-section (2}, an appeal to the Court *Appeal to Court of* of Session or Sessions Judge shall be heard by the Sessions judge or by an Swsiov *bow beard* Additional Sessions Judge:

Provided that an appeal against a conviction on a trial held by a Magistrate of the second class may be heard and disposed of by an Assistant Sessions judge or a Chief Judicial Magistrate.

(z) An Additional Sessions Judge, Assistant Sessions judge or a Chief judicial Magistrate shah hear only such appeals as the Sessions judge of the

68. See, 41st Report, p. 265, para. 51.24.
69. See, 41st Report p. 265. para. 31.25.
70. ***Lain Jela*** v. ***Stale of Gujarat,*** (1962) t Cri LJ 714: AIR 1962 Guj 125 (FRk ***Madan Bagdi*** v. ***State**** AIR 1967 Cal 528, 529. See, for joint appeal against acquittal of several persons, ***State of Gujarat*** v. ***Ramprakash P, Puri,*** (1969) 3 SCC 156, 158-59: 1970 SCC (Cri) 29.
71. ***Mukand Lai*** v. ***State,*** 17979 Cri LJ 105, TO6 (Del).
72. ***Kapil Deo Shukla*** v. ***State ofU.P***1958 Cri LJ 262: AIR K95S SC 121.

division may, by general or special order, make over to him or as the High Court may, by special order, direct him to hear.

Sub-section (2) of Section 381 restricts the jurisdiction conferred on Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate; it does not empower the Additional Sessions Judge or the Assistant Sessions Judge to receive appeals direct from parties and to admit them and take them on hie.[73 74 75]

The reasonable interpretation of Section 381(2) appears to be that an Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate is competent to hear only appeals properly filed under Section 374(3}, entertained by the Sessions Judge and thereafter transferred to him.[73 74]

24.8 Summary dismissal of appeals

(i) *Petition of appeal and copy of judgment to be examined*.—ff upon examining the petition of appeal and copy of the judgment received under Section 382 or Section 383 the appellate court considers that there is no sufficient ground for interfering it may dismiss the appeal summarily. [S. 384(1)]

Dismissing the appeal summarily means dismissing it, "in an informal manner and without the delay of formal proceeding".[75] Of course the informal dismissal of the appeal can be thought of only after examining the petition of appeal and the copy of judgment accompanying the petition of appeal. There cannot be partial summary dismissal of appeal, and therefore an appeal cannot be admitted only on ground of sentence while summarily dismissing it as regards conviction.[76] The summary dismissal of appeal under Section 384 is as much an adjudication as an order of dismissal after a full hearing so far as the accused is concerned.[77] The power to dismiss the appeal summarily should be exercised judicially and with great care. If arguable and substantial points are raised the appellate court should not dismiss the appeal summarily.[78] It is true that the appellate court has the undoubted power to dismiss an appeal summarily. But

73. *Pasupulati Nanjappa, re*,
74. *Koch7mmini*
75. *Rash Behari*
76. *Rabari Chela }adav v. State of Bombay*, i960 Cri Lj 1156:
77. *U.J.S. Chopra*
78. *Dnyanu Hariba Mali* v. *State of Maharashtra*, (1970) 3 SCC 7: 1970 SCC (Cri)

it must be realised that in a criminal case the accused has only one right of appeal and that should not be denied to him where arguable questions of fact are involved or a prima facie case for investigation is made out. The appellate court should be careful in exercising its discretion in dismissing appeals summarily and should not do so as a matter of routine.[79]

In *Sita Ram* v. *State of* U.P.[So] *{Sita Ram),* the Supreme Court felt that Section 384 dealing with summary dismissal of an appeal, even without the case-record and without the necessity of giving reasons for dismissal if the appellate court happened to be the High Court or the Supreme Court, was rather arbitrary in action and too broad in its sweep. The court held that the section shall be restricted by certain criteria in its application. The section in action shall not mean that all appeals falling within its fold shall, in the ordinary course, be disposed of routinely on a preliminary hearing. The rule, in case of appeals under Article *134(i)(a)* and *{b}* of the Constitution or under Section 379 of the Code[81], is issuing *notice* to the State, calling for the *records,* and *recording of reasons,* for dismissal of appeal. In exceptional circumstances, an appeal may be summarily dismissed after preliminary hearing, and looking into the materials placed by the appellant before the courts and after recording brief grounds for dismissal. In cases of real doubt the benefit of doubt is to go to the appellant and notice is to go to the adversary—even if the chances of allowance of the appeal may not be bright.

However later the Supreme Court has held that the *Sita Ram case {supra)* is no authority as to the scope of Section 384. Because in that case as the question of validity of Section 384 was neither raised nor argued, a discussion by the Supreme Court after "pondering over the issue in depth" would not be a precedent binding on the courts.[82]

{x) Calling for the case-record.—Before dismissing an appeal summarily under this Section 384, the court may *call* for the record of the case. [S. 384(2}]

(3) *Reasonable opportunity of being heard.*—No appeal presented under Section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same, [proviso *(a)* to sub-s. (1), S. 384]

What would amount to a reasonable opportunity depends upon the facts and circumstances of each case. Appeal under Section 382 has been mentioned in earlier para. 24.6. [7]

7 9. *Yasitt Gulam Haider v. State of Maharashtra,* (1979) 4 SCC 600: 1980 SCC (Cri) 145, 147:
19So Cri Lj 568, 570.
SO. (1979) 2 SCC 656: 1979 SCC (Cri} 576: 1979 Cri Lj 659.
81. For S. 379. *see supra,* para, *24.3(b).*
82. *Rajput Ruda Meha* v. *State of Gujarat, (1980)* 1 SCC 677: 1980 SCC (Cri) 317,

{4) *Special provisions regarding jail appeals*.—No appeal presented under Section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the appellate court considers that the appeal is frivolous or that the production ot the accused in custody before the court would involve such inconvenience as would be disproportionate in the circumstances of the case [proviso *(b)* to sub-s. (1), S. 384]. Further no appeal under Section 383 shall be dismissed summarily until the period for preferring such appeal has expired [proviso *(c)* to sub-s. (1), S. 3[8]4].

Appeals under Section 383 which are generally called "jail appeals" have already been described in para. 2.4.6. It has been observed that except perhaps in the High Courts, "jail appeals" are not considered with particular care, and in many cases, the grounds of appeal drafted in jail do nor attract sufficient attention and even if there may be any point in the appeal, it is liable to be dismissed.[31] The proviso *{b)* to sub-section (1) mentioned above would ensure that the "jail appeals" are not summarily dismissed without giving the appellant a reasonable opportunity of being heard unless the appellate court considers that the appeal is frivolous or the production of the accused in the court would involve inconvenience disproportionate in the circumstances of the case.[34] Further, proviso (c) to sub-section (1) mentioned above will ensure that an appellant wishing to avail of legal assistance will have presented an appeal under Section 38a before his appeal, if any, presented under Section 383 comes up for disposal. It has also been provided by sub-section (4) of Section 384 that, if in spite of this, a jail appeal happens to be dismissed summarily, that would not debar the court from considering an appeal under Section 38a on the merits, provided such appeal is otherwise duly presented and the court is satisfied that the interests of justice require that it should be heard.[31]

{5} *Recording of reasons*.—Where the appellate court dismissing an appeal under this section *[i.e.* S. 384] is a Court of Session or of the Chief judicial Magistrate, it shall record its reasons rot doing so [sub-section (3) of S. 384].

The orders of summary dismissals of appeals as passed by the appellate courts mentioned above are liable to be revised by the High Court; therefore ir would be very helpful if their reasons existed on record.[36] Where the appellate court dismissing an appeal summarily is the High Court, the above provision as such is not applicable; however as an appeal to the Supreme Court against such an order of High Court is possible under the provisions of the Constitution, it is equally necessary that the [83 84 85 86]

83. *See*, 41st Report,
84. *See*, joint
85. *See*, 41st Report,
86. *Ibid*, *266*, para.

High Court records its reasons while dismissing any appeal summarily. Time and again, the Supreme Court has pointed out that an appeal which raises arguable questions, either factual or legal, should not be summarily dismissed without recording a reasoned order.[87] [88] It has been observed by the Supreme Court:

> A *summary* dismissal of the appeal will then be legal if the appellate court considers that there is no sufficient ground for interference. But even in such circumstances it has been held that a summary decision is a judicial decision which vitally affects the convicted appellant and in a fit case, it is also open to be challenged on an appeal before this Court. Though a summary rejection, without giving any reasons, is not violative of any statutory provisions, such a manner of disposal removes every opportunity for detection of errors in the order. It has been further held that when an appeal in the High Court raises a serious and substantial point, which is prima facie arguable, it is improper for an appellate court to dismiss the appeal summarily without giving some indication of its view on the point. The interests of justice and fair play require that in such cases an indication must he given by the appellate court of its views on the point argued before it.[ss]

The Supreme Court has also pointed out[89] another valid reason for its insistence on a reasoned order of the High Courts disposing appeals:

> It may be thought that such orders are passed by this Court and therefore there is no reason why the High Courts should not do the same. We would like to point out respectfully that the orders passed by this court are final and no appeal lies against them. The Supreme Court is the final court in the hierarchy of our courts. Besides, orders without a reasoned judgment are passed by this court very rarely under exceptional circumstances. Orders passed by

87. ***Sampat Tatyada Shinde*** v. ***State of Maharashtra.*** (1974) 4 SCO 2.13: 1974 SCC (Cri} 382. 5S6: 1974 Cri LJ 674, 677: ***Sk. Mohd. AH*** v. ***State of Maharashtra,*** (1972} 2 SCC 7S4: 1973 SCC (Cri) ITT: 1973 Cri LJ 166; ***Mushtak Hussein*** v. ***State of Bombay,*** 1953 Cri Lj 1127: AIR 1953 SC 282; ***Dattu Genu Gaikwad*** v. ***State of Maharashtra,*** (1974) 3 SCC 678: 1974 SCC Cri 208: 1974 Cri IJ 446; ***K.V. Suroshe*** v. ***State of Maharashtra,*** (1974) 3 SCC 404; 1973 SCC (Cri) 969: T974 Cri Lj 330; ***Dhondiba*** v. ***State of Maharashtra,*** (1976) 1 SCC 162: 1973 SCC (Cri) 795: 1976 Cri LJ 856: ***Babboo*** v. ***State of M.P.,*** (1979) 4 SCC 74: 1979 SCC (Cri.) 743, 748: 1979 Cri Lj 908, 912; ***State of Punjab v. Jagdev Singh Talwandi,*** (1.984) r SCC 596: 3.984 SCC (Cri) 135: 1984 Cri Lj 177; ***Raghunath Laxman Makadwada*** v. ***State of Maharashtra. (1986)*** 2 SCC 90: 1986 SCC (Cri) 10S: ***1986*** Cri Lj ***85$; jawahar Lai Singh*** v. ***Naresh Singh,*** (1987) 2 SCC 222:

88. ***Shyam Deo Pandey*** v. ***State of Bihar,*** (1971) r SCC <855: 1971 S CC (Cri) 353, 359-60: 1971 Cri Lj 1177; see also, ***Govinda Kadtuji Kadam*** v. ***State, of Maharashtra,*** {1970) 1 SCC 469: T.970 SCC (Cri) 204: 1970 Cri Lj 995; ***Challappa Ramaswami v. State of Maharashtra,*** (1970) 2 SCC 426: 1970 SCC (Cri) 472: ***1971*** Cri Lj 79; ***Dagadu*** v. ***State of Maharashtra.*** (1981) 2 SCC 575: 1981 SCC (Cri) 564; 1981

89. *State of Punjaa v. jagdev Singh TaPvandi,* (1984) 1 SCC 596: 1984

> the High Court are subject to the appellate jurisdiction of this court under Article 136... and other provisions of the concerned states.[90]

The Supreme Court therefore concluded that the High Courts should not dispose of appeals by bald orders.[91]

(6) *Summary dismissal of jail appeal is no bar to the hearing of regular appeal.*—Where an appeal presented under Section 383 *ii.e.* a jail appeal) has been dismissed summarily under this section and the appellate court finds that another petition of appeal duly presented under Section 382 *(i.e.* a regular appeal) on behalf of the same appellant has not been considered by it, that court may, notwithstanding anything contained in Section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law. [sub-s. (4) of S. 384]

Section 393 referred to in the above provision deals with the finality of judgments and orders and would be discussed later in para. 24.15.

(7) *Non-appearance of the appellant.*—It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. However, a criminal appeal cannot be dismissed on the ground that no one appeared to support it.[92] The appellate court must consider whether there is sufficient ground for interfering which implies judicial consideration on the merits.[93] It has also been pointed out that the right to dismiss criminal appeals for default for appearance and then to restore the same, are not at all available to the criminal appellate courts subordinate to the High Court, which are solely governed by Section 386 and are devoid of ail inherent powers.[94]

As regards the disposal of appeals when the appellant or his counsel is not present it has been clarified by the Supreme Conn that the appellate

90. *State of Punjab* v. *jagdev Singh*

91. *State of ZJ.P.* v. *Hanpal Singh,* (1998) 8 SCC 747: 1999 SCC (Cri) 92.;

92. *Bant Singh* v. *State of* LO P., (1996) 4 SCC

93. *Trimbak Pahvant Vaidya* v. *Emperor,* ILR (1926} 50 Bom 673; *Guiab Das* v. *Emperor,* (1936) 37 Cri Lj

94. *RadheshyamSoni* v. *State,* X991 Cri

court has ample powers to dispose of them on merits.[1][2][3][4][5][6][7] However, if the appellant happens to be in jail, the appellate court should, adjourn and fix another date for hearing.[2][3][4]

In *Ram Naresb Yadav* v. *State of Bihar*[21], the Supreme Court had earlier held that the appellate court has no right to hear the appeal on merits in the absence of the appellant or his counsel. This view was overturned by the Supreme Court in *Bani Singh* v. *State of U.PA*, wherein the Supreme Court reaffirmed that the appellate court is entitled to dispose of appeals on merits in the absence of appellant or his counsel.

The Supreme court in *Mohd. Sukur Ali* v. *State of Assam*[5] opined that the court should not dispose of the appeal in the absence of his counsel. However, in *K.S. Panduranga* v. *State of Karnataka*[6], the Supreme Court reversed it and categorically ruled that *Bani Sirtgh* v. *State of U.P.*[7] *{Bani Singh)* is right. The court identified and indicated the law as emerging from *Bani Singh* thus:

i. That the High Court cannot dismiss an appeal for non-prosecution sim- pliciter without examining the merits;

z. That the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

3. That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

4. That it can dispose of the appeal after perusing the record and judgment of trial court;

5. That if the appellant is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

6. That if the case is decided on merits in the absence of the appellant the higher court can remedy the situation.

(8) *No power to allow withdrawal of appeal.*—Once an appeal has been entertained by the appellate court, the appellate court has no power to allow it to be withdrawn. It is the duty of the appellate court to decide the appeal irrespective of the fact that the appellant either does not choose

1. *Bani Singh* v. *State of*
2. *Bani Singh* v.
3. 1987 Cri Lj 1856: AIR 1987 SC 1300.
4. (1996) 4 SCC 720: 1996 SCC (Cri) 848: AIR 1996 SC 2439.
5. (2011} 4 SCC 729: (2011} 2 SCC (Cri) 481: 2011 Cri Lj 1690.
6. {20*3} 3 SCC 721: {2013) 2 SCC {Cri} 257: 2013 Cri LJ *1665*,
7. {1996) 4 SCC 720: 1996 SCC (Cri) 848: AIR *1.996 SC* 2439.

to prosecute it or is unable to prosecute it for any reason.[3] An appeal can abate only on the death of the accused and not otherwise.[8 9]

When the appeal is against conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal any of his near relatives may within 30 days of the death of the appellant, apply to the appellate court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

The power to grant leave to continue the appeal is conferred on the court and not on the Registrar under Order 6 of the Supreme Court Rules, 1966.[8 9 10]

24.9 Procedure for hearing appeals not dismissed summarily

Where the petition of appeal has not been summarily dismissed and the appeal is "admitted", Section 385 prescribes the further steps to be taken and the procedure to be followed for the hearing of the appeal. Section 385 reads as follows:

Procedure for hearing appeals not

385. (1) If the Appellate Court does nor dismiss the appeal summarily, it shall
cause notice of the time and place at which such appeal will be heard to be
given—

(/} ' to the appellant or his pleader;

{//) to such officer as the State Government may appoint in this behalf;

(Hi) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

{*.iv}* if the appeal is under Section 377, or Section 378, to the accused,

and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged

8. *Khedu Mohton* v. *State of Bihar* i'W7°i - SCC 450: 1970 SCC (Cri) 479, 482: 1971 Cri Lj 20; *Sudhindra Nath Dutt* v. *State,* 1957 Cri Lj 1245: AIR 1957 Cal 677; *Biswanath Chakramrty* v.

9. *Khedu Mohton* v. *State of Bihar,* (1970} 2 SCC 450: 1970

10. *jugal Kisbore K he taw at* v. *State of W.B.,* (2011) it SCC 502: (201 ii

Non-compliance with Section 385 may amount to violation of principles of natural justice.[11 12 13]

In case the appeal is not dismissed summarily, Section 385(2) requires the appellate court to send for the record of the case. However the rigour of rule has been taken away by the proviso to Section 385(2) in a certain situation mentioned therein. Therefore if the appellant himself says that the appeal should be allowed on the findings recorded by the Sessions Judge and the respondent has not raised any objection to this, the non-summoning of the record cannot be considered as fatal to the case. Moreover this irregularity will be curable under Section 465.[12 13]

In certain cases the courts may have to ensure production of accused. In *Mahendra Harjivan Luhar* v. *State of Gujaratis* the elder brother of the accused was produced in the place of the real accused in the appeal against his acquittal. It was only at the stage of imposing punishment did he represent that he was not the real accused. It was doubted whether it could happen without the collusion of police. The court desired to have investigation and in order to avoid recurrence issued a number of instructions one of which runs thus:

> In all acquittal appeals also whenever notices and warrants are issued by the High Court, the photographs and marks of identification should be crosschecked with the accused and when the notices are returned duly served and the warrants executed, they should accompany a certificate by the concerned Court forwarding them to the effect that the accused has been duly served after verifying his identity, name and address.

Powers of appellate court to grant bail

24.10

Sections 389 and 390 deal with suspension of sentence pending the appeal, release of appellant on bail, arrest of the accused in appeal from acquittal and his release on bail etc. These sections have already been discussed in paras 12.7, 12.8, and 12.10, and the same need not be repeated here.

Power of the appellate court to obtain further evidence

24.11

Appellate Court may take further evidence or direct it to be taken

Section 391 provides as follows:

> 391. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

11. *Arun Bhusan Chakravarty* v. *State of Assam*, 1990 Cri LJ 531
12. *Hanumant Dass* v.
13. 1999 Cri LJ 5015 (Guj).

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

Chapter XXIII of the Code referred to in Section 391 deals with "Evidence in Inquiries and Trials". The sections contained in the said chapter, namely, Sections 272 to 299, have already been discussed in earlier chapters.

The object of the section evidently is to ensure that justice is done between the prosecutor and the person prosecuted. Of course additional evidence cannot be tendered at the appellate stage as of right and the appellate court has to exercise discretion vesting in it to permit additional evidence on sound judicial principles. Surely, it is not an arbitrary discretion as is manifest by the provision that it "shall record its reasons".[14] [15]

The power to take additional evidence should be exercised sparingly and only in suitable cases. Since a wide discretion is conferred on appellate courts, the limits of such courts' jurisdiction must obviously be dictated by the exigency of the situation, and fair play and good sense appear to be the only safe guides. However, once such action is justified there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must of course, not be received in such a way as to cause prejudice to the accused, as for example, it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made, if the prosecution has had a fair opportunity and has not availed of it, unless the requirements of justice dictate otherwise.[u] The section is not meant to remedy the negligence or filling the latches left in the prosecution case or for allowing the prosecution to indulge in fishing of evidence.[14] [15] [16] It is also not meant to make out a case different from the one already on record.[17] Section 391 does not authorise the appellate judge to set aside the conviction and sentence and remand the case to the trial judge for recording evidence.[18]

In a case involving smuggling of gold, the prosecution under Section 391 prayed for formally proving the mint master's report to the effect that the gold was of specified purity.[19] The High Court rejected this prayer. On appeal, the Supreme Court ruled that societal interest should be

14. *Tokh Ram* v. *State*,
15. *Rajesiuar Prasad Misra* v. *re*, 1976 Cri Lj 1200
17. *Thomas* v. *State of*
18. T. *Vennila* v.
19. *State of Gujarat* v. *Mohanlal Jitamalfi*

adequately cared for and that the white collar offenders should be strictly dealt with. The court's observations are instructive:

> Apart from the fact that the alleged lacuna was a technical lacuna in the sense that while the opinion of the Mint Master had admittedly been placed on record it had not been formally proved the report completely supported the case of the prosecution that the gold was of the specified purity. To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender.[20]

The power to take additional evidence under Section 391 should not be used as a disguise for a retrial nor should it be used to direct fresh disposal 24.12 of the case by the trial court.[21]

Powers of the appellate court in disposing of appeals

Section 386 confers adequate powers on the appellate court for the proper disposal of different kinds of appeals. According to that section these powers are to be exercised only after satisfying two essential conditions:

[a] Before deciding to exercise any of the powers hereinafter mentioned the court must peruse the record of the case. As has already been mentioned in para. 24.9, Section 385(2} requires that after the admission of any appeal the appellate court shall send for the record of the case if such record is not already available in that court. This requirement is necessary to be complied with to enable the court to adjudicate upon the correctness or otherwise of the order or judgment appealed against not only with reference to the judgment but also with reference to the records which will be the basis on which the judgment is founded. It has been observed that there must be a clear indication in the judgment or order of the appellate court that it has applied its judicial mind to the particular appeal with which it was dealing. Such an indication will be available when the appellate court has considered the material on record, which means not only the judgment and petition of appeal, but also the other relevant materials.[22]

> Where the record has been lost or destroyed and it is not possible to reconstruct it, the appellate court cannot legally affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of the hearing of the appeal. The appellant has a right to satisfy the appellate court that the

20. *Ibid.* 37c (SCO.
21. *Govindan* v. *Food Inspector*, 19 8 z Cri Lj 784. 786 iKer).
22. *Skyam Deo Pande y* v. *State of Bihar*, {1971} 1 **SCX** 855: 19 71 SCC {Cri} 353, 361: 1971 Cri

between the date of the incident of the alleged crime and the date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the case. Where, however, such time lag is too wide, it would neither be just nor proper to direct retrial of the case, more so when even the copies of FIR and statements of witnesses under Section 161 and other relevant papers have been weeded out or otherwise not available. In such circumstances, the High Court may prefer to set aside the order of conviction and to acquit the accused.[23] *(b)* The appellate court must hear the appellant or his pleader, if he appears, and the public prosecutor, if he appears, and in case of an appeal by the State Government against sentence under Section 377, or of an appeal in case of acquittal under Section 378, the accused, if he appears.

It is a basic rule of natural justice that before a case is decided by the court, the parties to the case must be given a reasonable opportunity of being heard. It may be noted that if the appeal is from a judgment of conviction in a case instituted upon a complaint, then according to Section 385(i)(m), the appellate court admitting the appeal is required to give notice to the complainant of the time and place at which such appeal shall be heard.[24] However in such a case, though it is obligatory to hear the Public Prosecutor on behalf of the State, Section 386 does not specifically require the appellate court to hear the complainant (or his pleader) despite a notice being given to him of the hearing under Section 385(i)(m). This lacuna in Section 386 appears to have crept in by oversight, and it would be fair to expect that the appellate court would give to the complainant an opportunity of being heard in such a case.

After the two essential conditions as mentioned in *(a)* and *(b)* above are complied with, the appellate court, according to Section 386, may exercise any of the following powers in disposing of any appeal.

(1) *In cases where no interference is needed*.—The appellate court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal.

(2) *In an appeal from an order of acquittal*.—The appellate court may reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law [S. 386(12)].

23. *Sita Ram* v. *State*, 1981 Cri Lj 65, 66-67
24. *See supra*, para. 24.9.

It may be noted that any appeal against an order of acquittal can lie only to the High Court. While deciding an appeal against acquittal the power of the appellate court is no less than the power exercised while hearing appeals against conviction.[25] [26]

As to the exercise of the powers of the appellate court, the Supreme Court in *Sanwat Singh* v. *State of Rajasthan*[26] has laid down three principles. *Firstly*, the appellate court has full powers to review the evidence upon which the order of acquittal is founded.[27] [28] *Secondly*, the principles laid down by the Judicial Committee of the Privy Council in *Sheo Swarup* v. *King Emperor*[28] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal. These principles require that the appellate court should give proper weight and consideration to such matters as, the view of the trial judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of doubt, and the slowness of an appellate court in disturbing the finding of fact arrived at by a judge who had the advantage of seeing the witnesses. These matters and guidelines are the "rules and principles" in the administration of justice. *Thirdly*, the appellate court in coming to its conclusion should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal, but should also express those reasons to hold that the acquittal was not justified.[29] The appellate [25] [26] [27] [28] [29]

25. *Kailu* v. *State of M.P., (zoo6} 10* SCC 313: {2006} 3 SCC (Cri) 546: 2006 Cri LJ 799,
26. (1961) r Cri LJ 766: AIR 1961 SC 715, 719-20; *see also*, observations in *Ga?iesh Bhavan Patel* v. *State of Maharashtra*, {1978) 4 SCC 371:
27. Also see, *State of M.P.* v. *Bacchudas*, (2007) 9 SCC 135: (2007) 3 SCC (Cri) 87: 2007 Cri LJ 1661; *V.N. Ratheesh* v. *State of Kerala*,
28. 1936 Cri LJ 786: AIR 1934 PC 227.
29. *See*, the observations in *Damodarprasad Chandrikaprasad* v. *State of Maharashtra*, (1972) 1 SCC 107: 1972 SCC (Cri) no, 116: 1972 Cri LJ 451, 455; *Bhagwati* v. *State of U.P.*. {1976^ 3 SCC 235: 1976 SCC (Cri) 388, 391: 1976 Cri LJ 1171, 1173; *Noor Khan v. State of Rajasthan*, (1964) 1 Cri LJ 167: AIR 1964 SC 286; *Bahai Singh v. State of Haryana*, (1976} 3 SCC 564:1976 SCC (Cri) 461,462: 1976 Cri LJ 1568,1569-7o: *Sita Ram* v. *State of* M.P., (1975) 4 SCC 171: 1975 SCC (Cri) 464, 467-68: 1975 Cri LJ 37, 39; *Ram Jag* v. *State of U.P.*, (1974) 4 SCC 20T: 1974 SCC (Cri) 370. 373, 376: 1974 Cri Lj 479, 480, 483; *Solanki Ghimajrhhai Vkabhai v. State of Gujarat*, (19S3) 2 SCC 174: 1983 SCC (Cri) 379, 383: 1983 Cri LJ 822, 824; *Samson Hyam Kemkar* v. *State of Maharashtra*, (1974) 3 SCC 494: 1973 SCC (Cri) 1096,1100:1974 Cri LJ 809; *Ramji Surjya* v. *State of Maharashtra*, (1982) 2 SCC 620:

court should deal with each one of the reasons which prompted the trial court to record the acquittal and should point out how, if at all, those reasons were wrong or incorrect.[30]

It follows as a corollary from the above, that if two views of the evidence are reasonably possible, one supporting an acquittal and the other indicating conviction, the appellate court *{i.e.* the High Court) should not interfere merely because it feels, that it would, sitting as a trial court, have taken the other view.[31] Tw[r]o views and conclusions cannot be right and one in favour of the acquittal of the accused must be preferred over the other because our criminal jurisprudence demands that the benefit of doubt must prevail.[52] If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of reasonable doubt. But, fanciful and remote possibilities must be left out of consideration.

In *Kashirarn* v. *State of M.P..*[33] a three-judge Bench of the Supreme Court held that though the High Court while hearing an appeal against an acquittal has powers as wide and comprehensive as in an appeal against a conviction and while exercising its appellate jurisdiction the High Court can re-appraise the evidence, arrive at findings at variance with those

30. *Ram Chancier* v. *State of Haryana,* (1983} 3 SCC 335, 341, 343: 1983 SCO (Cri) 628: 1983 Cri Lj 1072, 11075, £077; *Harijann Thirupala* v. *Public Prosecutor,* {2.002.} 6 SCC 470: 2002 SCC (Cri) 1370; *State of U.P.* v. *Pappu,* (2005} 3 SCC 594: 2005 SCC (Cri) 780: 2005 Cri Cj 3 3 0

31. *Labh Singh* v. *State of Punjab,* (1976) 1 SCC x8 r; 1976 SCC (Cri) 812, 827: 1976 Cri Lj 21, 24;
Bhim Singh v. *State of Maharashtra,* (1974) 3 SCC 762: 1974 SCC (Cri) 238, 240: 1974 Cri Lj 337, 338; *Bhagirath Singh* v. *State of Bihar,* (197 *6) 1* SCC 614: 1976 SCC (Cri) 112, 119: 1976 Cri Lj 685, 690; *Miuluwa* v. *State of M.P., (1976)* 1 SCC 37: 1975 SCC (Cri) 759, 764: 1976 Cri Lj 717, 721; 5. AC Nazr v. *State of Kerala,* (1975) 3 SCC 150: 2974 SCC (Cri) 774, 780: r;974 Cri LJ 1279, 1285; *Rajendra Rai* v. *State of Bihar,* (1975} 5 SCC 193: 1974 SCC (Cri) 811,816: 1974 Cri Lj 1471, 1474; *State of Punjab* v. *Savitri Data,* 1983 Cri Lj 1093 (P&cH) (F8); *S.D. Usman* v. *State,* 19S2 Cri LJ 255. 260-6r (Mad); *Bab it* v. *State of U.P.,* (1983} 2 SCC 21: 19S3 SCC (Cri) 332, 338: 1983 Cri LJ 334, 337: *State of U.P.* v. *Samman Dass,* (1972) 3 SCC 201, in: 1972 SCC (Cri) 175, 285-86: 1972 Cri Lj 487; *Tara Singh* v. *State of M.P.,* 1980 Supp SCC 466: 1981 SCC (Cri) 375, 376: 1981 Cri Lj 485; *Dinarsath Singh* v. *State of Bihar,* (1980) 1 SCC 674: 1980 SCC (Cri) 320, 321: 19So Cn 'LJ 921; *K. Gopal Reddy* v. *State ofA.P.,* (1979) 1 SCC 355: 1979 SCC (Cri) 305,310: 1980 Cri Lj 812. *See,* observations in *Ganesh Bhauan Pate/* v. *State of Maharashtra,* (1978) 4 SCC 371: 1979 SCC (Cri) i: 1979 Cri Lj 51: AlR 1979 SC 155; *Awadhesh* v. *State of M.P.,* (198S) 2 SCC 557: 1988 SCC (Cri) 361: 19S8 Cri Lj 1154; *Peerappa* v. *State of Karnataka,* (2005) 12 SCC 461: (2006) 1 SCC (Cri) 586; *State of U.P.* v. *Gambh'tr Singh,* {2005) n SCC 27 s:: (2006) 1 SCC (Cri) 125; *Umrao v. State of Haryana,* (2006) 10 SCC 136: (2006) 3 SCC (Cri) 482: 2006 Cri LJ 2798; *Kalya n Singh* v. *State of M.P.,* (2006) 13 SCC 303: (2007) 3 SCC (Cri) 173; *Samghaji Hariba Patil* v. *State of Karnataka,* (2006) 10 SCC 494: (2007} 1 SCC (Cri) 113; *State of Jharkhand* v. *Niiyanand Pandey,* 200 *6* Cri Lj 1591 (jhar); *State* v. *Chakkera Khader,* 2006 Cri Lj 3744 (Kant); *Public Prosecutor* v. *Dagada Bitjji Reddv,* 2005 Cri LJ 835 (AP).

32. *Damodarprasad Chandrikaprasad* v. *State of Maharashtra,* (1972) 1 SCC 107: 1972 SCC (Cri) n0, 116: 1972 Cri LJ 451, 455; *Khedu Mohton* v. *State of Bihar, {1970)* 2 SCC 450: .1970 SCC (Cri) 479, 481: 1971 Cri Lj 20; *Dkaramdeo Singh* v. *Sta te of Bihar,* {1976) 1 SCC 610: 1976 SCC (Cri) 10S, riz: 1976 Cri LJ 638, 641.

recorded by the trial court in its order of acquittal and arrive at its own findings, yet, the salutary principle which would guide the High Court is—if two views are reasonably possible, one supporting the acquittal and the other recording a conviction, the High Court would not interfere merely because it feels that sitting as a trial court its view would have been one of recording a conviction. It follows as a necessary corollary that it is obligatory on the High Court while reversing an order of acquittal to consider and discuss each of the reasons given by the trial court to acquit the accused and then to dislodge those reasons. Failure to discharge this obligation constitutes a serious infirmity in the judgment of High Court.[3n]

it has been held in *Shaima Jafari* v. *Irfan*[35] that the judgment of the appellate court ought to he reasoned one and must reflect application of mind and appropriate ratiocination either for affirmative or reversal of judgment. Appellate judgments that refer to some parts of trial court's judgment and hold that the conclusion of trial court is not perverse, neither reflects reason nor indicate analysis by the appellate court. It was further held by the Supreme Court in *Bakshish Ram* v. *State of Punjab*[*6] that the appellate court has to apply its mind independently and record its own finding by making independent assessment of evidence.

Where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is not only open to the High Court but it is also its obvious duty to interfere with the order of acquittal in the interest of justice, lest the administration of justice be brought to ridicule.[37]

It has been held by the Supreme Court that in the matter of appreciation of evidence the powers of appellate court are as wide as that of the trial court. If the trial court has resorted to perverse application of the principles of evidence or show lack of appreciation of evidence the appellate court may reappreciate the evidence and reach its conclusion.[38] The Supreme Court may reappreciate evidence in cases where the High Court reverses conviction/acquittal and records acquittal/conviction.[39] When [34] [35] [36] [37] [38] [39]

34. Also Read *Soma Bhai* v. *State of Gujarat,* (1975/ 4 SCC 267..
35. (2.013) *4 SCO 348; 2013 Cri LJ 1829.
36. (2013) 4 SCC 131: (2013) 2 SCC (Cri) 328: 2015 Cri LJ 2052.
37. *K. Gopal Reddy* v. *State of A.?,, (1979)* 1 SCC 355: 1979 SCC (Cri) 305, 3112 1980 Cri Lj 812; see also, *S.D. Usman* v. *State,* 1982 Cri LJ 255, 260 (Mad); *Kbem Karan* v. *State oflJ.P(1974)* 4 SCC 603: 1:974 SCC (Cri) 639, 642: 1974 Cri Lj 1033; *Aher Pitba Vajsbi* v. *State of Gujarat,* 1983 SCC (Cri) 607: 1983 Cri Lj 1049; *Ravinder Singh* v. *State of Haryana,* (1975) 3 SCC 742: 1975 SCC {Cri} 202, 211: 1975 Cri LJ 765; *State* v. *Des Raj.* 1979 Cri Lj 558, 562 (J&K); *State of M.P.* v. *Baccbudas,* (2007) 9 SCC 355: {2007) 3 SCC (Cri) 87: 2007
38. *Lai Mandi* v. *State* of W.B. , {1 99)5) 3 SCC 603: 1995 SCC! (Cri) 560; *Dbarma* v. *Ninnal Singh,* (3996) 7 SCC 471: 1996 SCC (Cri) 444: 1996 Cri Lj 1631. In such cases the com- plainam can approach the
39. *Saibir* v, *Surat Singh,* (1997) 4 SCC 392: 1997 SCC (Cri) 538: *Madari Lai* v. *State of J&K,*

several persons were alleged to have committed an offence in furtherance of their common intention and all except one are acquitted, it is open to the appellate court under Section 386(i)(h) to find out on a reappraisal of the evidence who were the persons involved in the commission of the crime and although it could not interfere with the order of acquittal in the absence of a state appeal it was entitled to determine with the help of Section 34, Penal Code, i860 (IPC), the guilt of the person who committed the crime, notwithstanding the acquittal of the co-accused.[40] Also, in cases where the co-accused has not appealed the benefit of the appellate court's order could be extended to him.[41]

If the appellate court finds the accused guilty it may reverse the order of acquittal and pass sentence on him according to law. But in such a case as the appellate court is to do what the trial court ought to have done, it should not impose a punishment higher than the maximum that could have been imposed by the trial court. An appeal court is after all "a court of error", that is, a court established for correcting an error.[42] It has also been expressly provided by the second proviso to Section 386 that the appellate court shall not inflict greater punishment for the offence, which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal.

In passing an order in appeal from an order of acquittal, the High Court has the same power, to convict the accused of an offence disclosed by the evidence on record, which the trial court has under Sections 221 to 222, even though no charge in respect of that offence has been framed against the accused.[43]

In an appeal against acquittal, the High Court has power under Section *3$6{a)* to direct further inquiry to be made. Here inquiry means according to Section *z(g),* every inquiry other than a trial conducted under the Code by a Magistrate or court. Therefore, the High Court can put the proceedings at the pre-trial stage and obviously at the stage before the framing of the charge but after the filing of the police report.[44]

The expression "retrial" in Section *386(a)* is used in an unlimited or unrestricted sense. In the absence of any indication to the contrary it can be taken to mean partial retrial also. An appellate court reversing the

(1997) 7 SCC 677: 1997 SCC (Cri) 1151.

40. *Khujji* v. *State of M.P.*, {1991} 3 SCC 62.7: 1991 SCC (Cri) 916: 1991 Cri Lj 2.653; *Brathi v. State of Punjab*, (1991) *1* SCC 519: 1991 SCC (Cri) 203: 1991 Cri LJ 402.
41. *Jashubha Bbaratsinh Gohil* v. *State of Gujarat*, (1994) 4 SCC 353: 1994 SCC (Cri) 1193; *Raja Ram* v. *State ofM.P.*, (1994) 2 SCC 568: 1994 SCC (Cri) 573.
42. *Jagat Bahadur* v. *State ofM.P.*, 1966 Cri LJ 709, 712: AIR 2966 SC 945; see also, *Shankar Kerba Jadhav v. State of Maharashtra*, (1969) 2 SCC 793, 801: (1971) 1 Cri LJ 693, 697-99.
43. *Ramaswamy Nadar v. State of Madras*, 1958 Cri LJ 228, 230-31: AIR 1958 SC 56; *Emperor* v. *Ismail Khadirsab*, (1928) 29 Cri LJ 403: AIR 1928 Bom 130.
44. *jetha Nand v. State of Haryana*, 1983 Cri LJ 305, 308 (P&H).

order of acquittal may order a retrial; and such a retrial can be ordered from the stage at which an error or illegality has crept in.[45]

{3) *In an appeal from a conviction—*

[i) the appellate court may reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or *{it)* the appellate court may alter the finding, maintaining the sentence, or

{Hi) the appellate court may with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same. [S. 386(b)]

Where the appellate court, under sub-clause (i) above, reverses the finding and sentence, it has two courses open; it may acquit or discharge the accused, or it may order the accused to be retried or committed for trial. The expression "alter the finding" in Section 386(b) above has only one meaning and that is "alter the finding of conviction and not the finding of acquittal".[46] The words "reverse the finding and sentence" in subclause *(i)* above mean to set aside or annul the conviction and sentence.

A retrial is not to be ordered merely to enable the prosecution to adduce additional evidence for filling up the gaps or lacunae left at the trial.[47] An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the trial court had no jurisdiction to try the case or that the trial was vitiated by some serious illegality or irregularity, or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial, or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice the appellate court deems it appropriate, having regard to all the circumstances of the case, that the accused should be put on his trial again.[48] Once retrial is ordered by the appellate court in exercise of powders under Section 386(b) (/), the evidence which is already on record is deemed to be obliterated off from the record.[49] It may also be noted that there is no power of remand except for the purpose of

45. *K. Subramanian* v. *Kunhumon*, 1974 Cri Lj 548, 549 (Ker); *Lakshmanan Sundaram* v. *State of Kerala*, 1990 Cri LJ 1800 (Ker).

46. *State of A.P.* v. *Thadi Narayana*, (1962) 1 Cri LJ 207, 211: AIR 1962 SC 240.

47. *State of Gujarat* v. *Rajubbai Dhatnirbhai Bariya*, 2004 Cri LJ 771 (Guj).

48. *Ukba Kolhe* v. *State of Maharashtra*, v. *State of W.B.*, (1965) 2 Cri LJ 817,

49. 821: AIR 1965 SC

retrial. In a case where the trial court had failed to hear the accused on the question of sentence, the appellate court cannot, under Section 3*S6(b)* or under any other section of the Code, remand the case to the trial court for the purpose of hearing the accused on the question of sentence.[50] [51] [52] [53]

The order of retrial which the appellate court can pass in the context of an appeal from a conviction is retrial for the same offence for which the accused was convicted and not of another since it would be wrong for the appellate court to assume that the whole case is before it.[51] [52] [53]

The power of the appellate court to commit the accused person for trial is not confined to cases exclusively triable by a court of session, and it is within the power of the appellate court to commit even such cases as are triable by any Magistrate.[32]

The words "alter the finding" in sub-clause *{it}* above mean only the alteration of the order of conviction and further these words only mean modification of the conviction and not its obliteration or annulment. It is now well settled that the power of the appellate court to alter the finding is confined to offences for which the accused could have been convicted by the trial court under Sections 221 and 2.2.2.[33]

Situations may arise in which the accused is convicted of an offence less grave than that for which he was prosecuted. In such cases, the view taken is that he is deemed to have been acquitted of the graver offence. Thus where a person is charged with an offence of murder under Section 302 IPC but convicted of culpable homicide not amounting to murder under Section 304 IPC, there Is an Implied acquittal of the offence of murder under Section 302 IPC.[54] If therefore the accused appeals against the conviction under Section 304 IPC and the State does not appeal against the acquittal under Section 302, the appellate court cannot alter the finding under Section 304 IPC Into one of conviction for murder under Section 302 IPC.[55]

In a case where an accused person Is charged with several offences, the trial is no doubt one; but where the accused is acquitted of some offences, and convicted of others, the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the appellate court. If the accused files an appeal against his conviction, and the State does not appeal against the order of acquittal, then it is only the order of conviction that falls to be considered by the

50. *Pratul Chaudhari*
51. *jet-ha Hand* v. *State of*
52. *State of U.P.* v.
53. For the text of Ss.
54. *Kishan Singh* v. *Emperor,*
55. *See,* 41st Report, pp.

appellate court, and not the order of acquittal. Therefore, in construing the expression "alter the finding" in Section *386{b)(ii)* above, it cannot be assumed that the whole case is before the appellate court when it entertains an appeal against conviction. The expression "alter the finding" has only one meaning, and that is, "alter the finding of conviction" and not "alter *any* finding of the trial court whether it be one of conviction or acquittal". -[6] Similarly, where an appeal against acquittal is preferred by the State, the respondents are not entitled to challenge their conviction in respect of other offences when they have not preferred any appeal against the same. Further, since they have not availed themselves of the right of appeal, a revision at their instance is barred under Section 401(4). It is, however, open to the High Court to act suo motu to prevent a miscarriage of justice.[56] [57]

According to sub-clauses *(ii)* and *{Hi}* of Section *386{b)* above, the appellate court may alter the finding and maintain the sentence or alter the nature or the extent or the nature and extent of the sentence but not so as to enhance the same; or the appellate court may even without altering the finding, alter the nature or the extent, or the nature and the extent, of the sentence but not so as to enhance the same.

A sentence is said to be enhanced when it is made more severe. If the sentence of fine is changed into one of imprisonment it would amount to enhancement of the sentence. However, an enhancement of fine was held not to amount to enhancement of sentenced[8] Where a court awards a sentence of fine and also directs that in default of payment of fine the offender shall undergo a term of imprisonment, the offender, according to Section 70 IPC, is not relieved of the liability to pay the fine by undergoing the said term of imprisonment. Therefore, where the sentence of four months' imprisonment passed by the trial court was altered by the appellate court to "3 months[1] imprisonment and a fine of [A] 500 and in default to undergo rigorous imprisonment for one month", the sentence passed by the appellate court would amount to enhancement of the sentence as the fine would still be recoverable after undergoing the whole imprisonment of four months.[59] However, in a case where the aggregate sentence of imprisonment awarded by the appellate court is in any way less than the period of the original sentence of imprisonment, the fact that fine is in addition imposed by the appellate court would not be considered as an enhancement of the sentence by the appellate court.[60] [56] [57] [58] [59] [60]

56. *State of A.P. r. Thadi Narayana,* (1962) 1 Cri LJ 207, 211: AIR 1962 SC 240.
57. *State of Orissa v. Mathuri Mallik,* 1979 Cri LJ 508, 510 {On); see also, *Lakhan Mahto* v. *State of Bihar,* 1966 Cri LJ 1349: AIR 1966 SC
58. *Devu* v. *Excise Circle hispector,* 1986 Cri LJ 1478 (Ker).
59. *Nandeswar Barua* v. *State,*
60. *Bhakhtavatsalu Naidu* v. *Emperor.* ILR {1906} 30 Mad 103 (FB).

(4) *In an appeal for enhancement of sentence*—

(i) The appellate court may reverse the finding and sentence and acquit *or* discharge the accused or order him to be retried by a court competent to try the offence, or

(ii) the appellate court may alter the finding maintaining the sentence, or

(in) the appellate court may with or without altering the finding, alter the nature or the extent, or the nature and extent of the sentence, so as to enhance or reduce the same. [S. 386(c)]

As already seen, the appellate court is not to inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal, [proviso 2 to S. 386]

The first proviso to Section 386 provides that the sentence shall not be enhanced unless the accused has had an opportunity showing cause against such enhancement. This provision is already included in Section 377(3).[61]

The powers enumerated here in case of an appeal for enhancement of the sentence are almost the same powers as described in sub-para (3} above in respect of an appeal against the conviction. Here, of course additional powers to enhance or reduce the sentence have been given to the appellate court.

If a substantial punishment has been given for the offence of which a person is found guilty, after taking due regard of all the relevant circumstances, normally there should be no interference by an appellate court. On the other hand, interference will be justified when the sentence is manifestly inadequate or unduly lenient in the particular circumstances of the case. The interference will also be justified when the failure to impose a proper sentence may result in miscarriage of justice.[62]

(5) *In an appeal from any other order.*—The appellate court may in such a case alter or reverse such order. [S. 386(d)]

(6) *Consequential or incidental orders.*—The appellate court may make any amendment or any consequential or incidental order that may be just or proper. [S. 386(e)]

Consequential and incidental orders are in fact the complements of the main order of the court and should necessarily follow the main order. In a case where the accused is convicted for more offences than one, it is the plain duty of the court to impose an appropriate sentence under each

61. *See supra*, para. 24.4.

62. *Kodavandi Moidean* v. *State of Kerala*, (1973) 3 SCO 469: 1973 SCC

section of which the accused is convicted, and an omission to do so is an error in law. Therefore the appellate court in such a case would have the power under the above Section 386(e) to pass such order as to sentence as would be consequential upon the order of conviction.[63] The powers given to the appellate court under Section 386 are quite wide and the court can alter or amend a charge provided that the accused is not prejudiced either by keeping him in the dark about the charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him.[64] In view of the powers given by Section 386(e) above, the appellate court can pass orders under Sections 106(4), **335**, 35[A]4h **357**(**4**), **359**(**2**-)* 452, 454(3) and 456(2).

(7) *No dismissal of appeal for default or on the appeal becoming infructuous*.—The Code does not contain any provision for dismissal of an appeal for default.[65] Neither is there any provision for dismissal on the ground that the appeal has become infructuous. From the scheme of the code and in view of the finality attached to the appellate judgment, it appears that once the court decides not to dismiss an appeal summarily, it should dispose it of giving reasons for its conclusion except where it abates according to the provisions of Section 394.[66]

24.13 Procedure where judges of court of appeal are equally divided

When an appeal under this chapter is heard by a High Court before a bench of judges and they are divided in opinion, the appeal with their opinions, shall be laid before another judge of that court, and that judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion. [S. 392] From this provision it is not appropriate to infer that the legislature intended that a criminal appeal should be laid only before a bench of two judges.[67] However the proviso to the above Section 392 provides that if one of the judges constituting the bench or, where the appeal is laid before another judge under this section, that judge, so requires, the appeal shall be reheard and decided by a larger bench of judges. A question may arise as to whether the third judge ought to consider himself bound by the views expressed by the two referring judges, on points on which there was no difference of opinion between the two judges. It has been held that the third judge should bring to bear his independent opinion.[68] The Supreme Court

63. *Jayaram Vitkoba* v. *State of Bombay*, 195 *6* Cri LJ 318, 321: AIR 1956 SC
64. *K.C. Mehta* v. *State of*
65. *State* v. *Ra?n Gopal*, 2006 Cri LJ 2805 (Del).
66. *Balan* v. *State*, 1981 Cri Lj 1549,
67. *Satwant Singh* v. *State*, 1986 Cri Lj 1352, 1354 (Dei).
68. *Repana Naganna*, *re*, (1961) 1 CriLJ

has expressed the view that it is for the third judge under this section to decide on what points he shall hear arguments if any, and that postulates that the third judge is completely free in resolving the difference as he thinks fit.[69] In a case where the State appeal against the acquittal of the accused for offence under Sections izo-B, zi8, 347, 389 IPC had been dismissed by the Division Bench of the High Court, and where due to the difference of opinion regarding the correctness of the acquittal of the accused for offences under Section 161 IPC and Section 5(i)(tfz), Prevention of Corruption Act, that part of the matter was referred to the third judge, it is not permissible for the third judge to reopen the entire matter and to convict the accused for offences under Sections 347, 389 and izo-B IPC.[7°]

24.14 Appeal is required to be heard by the Bench specified by the Rules

When the High Court Rules specify a bench that should hear a category of appeals, they should be heard by such bench. Otherwise, the judgment would be a nullity. In a case wherein a single judge acquitted some dependants of an offence punishable with two years' imprisonment, the Supreme Court held that judgment to be a nullity inasmuch as such an offence was required to be heard by at least two judges constituting to a Division Bench under the Bombay High Court Rules.[71] The court's observations are instructive:

> When a matter required to be decided by a Division Bench of the High Court is decided by a learned Single Judge, the judgment would be a nullity the matter having been heard by a court which had no competence to hear the matter, it being a matter of total lack of jurisdiction. The accused was entitled to be heard by at least two learned judges constituting a Division Bench and had a right to claim a verdict as regards his guilt or innocence at the hands of the two learned judges. This right cannot be taken away except by amending the rules. So long as the rules are in operation it would be arbitrary and discriminatory to deny him this right regardless of whether it is done by reason of negligence or otherwise.[72]

Singh v. *State of M.P.*, (1999} r SCC 315: 1999 SCC {Cri} 44; *Radha Mohan Singh* v. *State ofU.P., (zoo6}* z SCC 45°: {2.006) *1* SCC {Cri} 661.

69. *Babu* v. *State of V.P.,* (1965} z Cri LJ 539: AIR 1965 SC 1467, 147°; *Hethubha* v. *State of Gujarat,* (197°) 1 SCC 72°: 197° SCC (Cri) 2.8°, 285: 197° Cri LJ 1138; *Union of India* v. *B.N. Ananti Padmanabiah,* {1971) 3 SCC 278: 1971 SCC (Cri) 535, 537: 1971 Cri Lj 1287; see also, *Sajjan Singh v. State of* M.P., (1999} 1 SCC 315: 1999 SCC (Cri) 44.

70. *Bhagat Ram v. State of Rajasthan,* (1972) 2 SCC 466: *197Z* SCC {Cri} 751, 756: T972 Cri Lj 9°9, *?xz.*

71. *Pandurang* v. *State of Maharashtra,* {1986) 4 SCC 436: 1986 SCC (Cri) 5°°: 19 8 *6* Cri Lj *975-

72 .*Ibid.*

Order of High Court on appeal to be certified to lower court Whenever a case is decided on appeal by the High Court under this chapter, it shall certify its judgment or order to the court by which the finding, sentence or order appealed against was recorded or passed and if such court is that of a Judicial Magistrate other than the Chief Judicial Magistrate, the High Court's judgment or order shall be sent through the District Magistrate. [S. 388(1)] 24.15

The court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court; and if necessary, the record shall be amended in accordance therewith. [S. 388(2.}]

Rules regarding judgment of subordinate appellate court

24.16

The rules contained in Sections 353 to 365 as to the judgment of a criminal court of original jurisdiction shall apply, so far as may be practicable, to the judgment in appeal of a Court of Session or Chief judicial Magistrate. [S. 387] However, unless the appellate court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered, [proviso to S. 387] Sections 353 to 365 referred to above have been discussed earlier in Chapter 2,3. It is obvious from Section 362 which, by Section 387, has been made applicable to the judgments of the appellate courts, the appellate court is not to alter or review the judgment once signed and delivered, except for the purpose of correcting a clerical or arithmetical error. In that sense, the judgment of the appellate court when once delivered is final. It has been held that once the lower appellate court gives the orders it becomes functus officio.[73] However, if the appeal was dismissed for default of absence of appeal, the sessions court can hear the appeal and it may not amount to review inasmuch as there will be no judgment under Section 362 of the Code.[74]

Section 354(i)(fi) is applicable to the judgments in appeal of a Court of Session or Chief judicial Magistrate. Therefore, such a judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision.[75] Even though Section 387 is not applicable in respect of the judgment in appeal of the High Court, it has been held by the Supreme Court that the High Court must indicate in a reasoned judgment that it has applied its mind to the material questions of fact and law. A judgment may be brief, not a blank, especially in case of appeals against the order of conviction for serious offence.[76]

73. *Dilip* v. *State of*
74. *Mohd. Sa-uman Alt* v. *State of Assam,* 1994 Cri Lj 2809 (Gau).
75. *Naresh Kumar* v. *State of U.P.,* 1981 Cri LJ 378, 379 (Ali).
76. *Alijan* *Nanhe*

However, it has been held that the High Court should not interfere with the judgment of an appellate court confirming the findings of the trial court on the bare fact that reasons had not been given for the finding.[77]

24.17 Finality of judgments and orders on appeal

Finality of judgments and orders on

Section 393 provides as follows:

393. judgments and orders passed by an Appellate Court upon an appeal shall be final, except in the cases provided for in Section 377, Section 378, subsection {4) of Section 384 or Chapter XXX:

Provided that notwithstanding the final disposal of an appeal against conviction in any case, the Appellate Court may hear and dispose of, on the merits,—

la) an appeal against acquittal under Section 378, arising out of the same case, or

(6) an appeal for the enhancement of sentence under Section 377, arising out of the same case.

The appellate court including the High Court cannot review its own judgment passed in an appeal. The absence of the provision for review of the judgment shows that the legislature did not intend to have the judgment reviewed.[7S] Apart from the fact that there is no review of the decision of the appellate court, the law does not provide for any appeal against the decision of the appellate court except an appeal against the order of acquittal under Section 378 or an appeal by government for enhancement of sentence under Section 377. The only remedy against the decision of the appellate court is by way of revision under certain circumstances.[79]

24.18 Abatement of appeals

Abatement of appeals

Section 394 provides as follows:

394. (r) Every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation. In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

(1987} 2 SCC 55: 1987 SCC (Cri) 259.

77. *Manuel Fernandes* v. *State*, 1978 Cri LJ 305, 306 (Goa JCC).

78. *Ro$ha?ilal* v. *State*, 1975 Cri LJ 1583, 15S9 (Cal).

79. *See infra*, Chap. 25.

From this section it is clear that an appeal against an acquittal under Section 378 or an appeal for the enhancement of the sentence under Section 377, can only abate on the death of the accused and not otherwise. Once an appeal against an acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact that the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other.[80]

Section 394 does not specifically provide for cases where the complainant dies after presentation of an appeal against acquittal under Section 378(4). Considering the wording of sub-sections (1) and (2) it is obvious that such an appeal does not abate on the death of the complainant. In view of Section 302 which provides for permission to conduct prosecution, it would be within the power of the court to permit any person to prosecute an appeal which is not liable to abatement on the death of the appellant.[81]

Every appeal against conviction abates on the death of the accused except an appeal from a sentence of fine.[82] An appeal from a sentence of fine is excepted from the all pervasive rule of abatement of criminal appeals for the reason that the fine constitutes liability on the estate of the deceased and the legal representatives of the deceased on whom the estate devolves are entitled to ward off that liability.[83] [84] [85] It has been opined that since there is no specific provision relating to the situation where the complainant dies in an appeal filed by the convicted person, the state should step into the shoes of the complainant.[84] [85]

As an appeal from a composite order of sentence combining the substantive imprisonment with fine is ordinarily directed against both the sentences, it is not therefore strictly speaking an appeal from a sentence of fine for the purposes of Section 354. But such an appeal does not for that reason cease to be an appeal from a sentence of fine. In an appeal from a judgment imposing a sentence of fine either by itself or along with a sentence of imprisonment, the legality or propriety of the sentence of fine necessarily involves an examination of the validity of the order of conviction. The sentence follows the conviction and the validity of the two is interconnected.[83]

80. *Khedu Mohton* v. 3 SCC 343: 1974

82. *Rain Ishwar Chaudhary* v. *State of Bihar*, 198 6 Cri

83.

84. *Kamalakanta Rana* v. *Radibandhu Rana*, 1996 Cri

85.

The main object of the proviso to sub-section (z) above is to provide a machinery whereby the children or the members of the family of a convicted person who dies during appeal could test the conviction and get rid of the odium which would otherwise attach to them.[86] [87] [88] Further, the interest of the legal representatives of the deceased appellant in the appeal may not be purely sentimental, it can be pecuniary also even though the appeal might have been against the sentence of imprisonment. Thus, if the conviction is on a charge of murder of a near relation whose heir, or one of whose heirs, is the alleged murderer, he (if the conviction is not set aside) will be disqualified from inheriting his property. If he dies during the pendency of the appeal, his heirs have a pecuniary interest in prosecuting the appeal. If the appeal succeeds, their right of inheritance to the property of the deceased through the appellant will be saved.[87] [88] Therefore, the principle underlying the above proviso appears to be eminently sound. The requirement of the leave of the court to continue the appeal, and the time-limit provided for filing an application for such leave, are the necessary safeguards against the probable misuse of the provision.

24.19 Legal aid in appeal cases

An indigent accused person may be involved in an appeal case either as a respondent in an appeal against his acquittal, or as an appellant seeking redress against the mistakes and errors in the order of conviction passed against him by the trial court. In either case the liberty of indigent accused person may be in jeopardy and hence Article zi of the Constitution would require the appeal procedure to be "reasonable, fair and just" procedure. As an essential ingredient of such a procedure, as has been held by the Supreme Court in *Hussainara Khatoon (4)* v. *State of Bihar*[m], it will be necessary to provide at State expense, a lawyer to an indigent accused person, be he the respondent or the appellant, if he is unable to engage one due to his poverty or indigence. If legal aid to an indigent accused person is an essential component of "reasonable, fair and just" procedure in trial proceedings, it is equally, if not more, so in appellate proceedings. *Firstly,* it is not easy for a layman to understand all the legal implications of the judgment of the trial court in the context of the appellate proceedings. *Secondly,* in such proceedings, quite often, intricate questions of law and fact are involved. They would require the skilful and careful handling by a competent lawyer. *Thirdly,* the State is represented in appeals by well qualified and experienced Public Prosecutors. Therefore, for the proper and just working of the adversary system at the appellate stage, it is necessary that the indigent accused person is represented by a competent law-

ver. Though justice and fair play do require adequate provision for legal aid at the appellate stage, it has not so far attracted as much attention as it has in case of trial procedures. The Code does not make any specific provision for giving legal aid to indigent accused persons in appeal proceedings. However the Supreme Court has held that as a matter of prudence the court, may in an appropriate case appoint a counsel at the State's expense to argue for the cause of the accused.[S9]

As mentioned earlier in para. 14.11 the Code has made provision to provide a lawyer at State expense to an indigent accused person in a trial before a Court of Session; the Code also enables a State Government to extend this right to any class of trials before other courts in the State. If in any such trial the accused is acquitted and the State prefers an appeal against the order of acquittal, even in such a situation, the Code surprisingly fails to make any specific provision for providing a lawyer to the indigent accused person to defend himself.

In accordance with civilised jurisprudence, the Code, subject to just exceptions, provides for a right of appeal against an order of conviction. However such a right would not mean much to the indigent convicted person without the able representation by a competent lawyer. The Code does not make any provision for legal aid even in such cases where the order of conviction is prima fade wrong and invoking the appellate jurisdiction is necessary to avoid miscarriage of justice. In this context, the existing provisions regarding "jail appeals"[89 90] are far from adequate and can hardly be considered as a proper substitute for able representation of the indigent convicted person by a competent lawyer. Here it may be pertinent to note the observations of the Supreme Court in *M.H. Hoskot* v. *State of Maharashtra*[89 90 91].

The Supreme Court observed:

> *Maneka Gandhi case*[92] has laid down that personal liberty cannot be cut out or cut down without *fair* legal procedure. Enough has been set out to establish that a prisoner, deprived of his freedom by court *sentence but* entitled to appeal against such verdict, can claim, as part o± his protection under Article 2.1 and as implied in his statutory right to appeal, the necessary concomitant of right to counsel to prepare and argue his appeal.
>
> If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign

89. *Rishi Natulan Pandit* v. *State of Bihar,* (1999} 8 5CC *644:* 200c
90. *See supra,* paras S4.6(2} 8nd 24.8(4)(6).
91. {1978) 3 SCC 544: 1978 SCC (Cri) 468: 1978 Cri Lj 1678.
92. *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248, 284: AIR T978 SC

> for such imprisoned individual 'for doing complete justice'. This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not government's charity.[93] [94] [95]

The Supreme Court have had an opportunity to express its difficulty in processing an appeal when the petitioner in person appeared and argued his case.[93] [94] The court suggested that such persons should be provided legal aid and it indicated various agencies offering legal aid to poor. At present the provisions of the Legal Services Authorities Act, 1986 help the indigent appellant in getting legal aid.

93.

94.
SCC (Cri)

Chapter 25

Review Procedures: Revision

25.1 Object and scope of the chapter

In the earlier chapter it was considered how a person aggrieved by the decision of a criminal court could go in appeal to the higher court and obtain redress. However, the right of appeal is not available in each and every case and is confined to such cases as are specifically provided by law. Secondly, even in such specified cases, the Code ordinarily allows only one appeal, and a review of the decision of the appellate court is not normally permissible by way of further appeal to yet another higher court. In order to avoid the possibility of any miscarriage of justice in cases where no right of appeal is available, the Code has devised another review procedure, namely, "revision". Sections 397 to 405 deal with the powers of "revision" conferred on the higher courts and the procedure to regulate these powers. The powers of revision conferred on the higher courts are very wide and are purely discretionary in nature. Therefore, no party has any right as such to be heard before any court exercising such powers. The revisional powers, though quite wide, have been circumscribed by certain limitations. For instance, *a)* in cases where an appeal lies but no appeal is brought, *ordinarily* no proceeding by way of revision shall be entertained at the instance of the party who could have appealed; *b)* the revisional powers are not exercisable in relation to any interlocutory order passed in any appeal, inquiry or trial; *c)* the court exercising revisional powers is not authorised to convert a finding of acquittal into one of conviction; *d)* a person is allowed to file only one application for revision either to the Court of Session or to the High Court; if once such an application is made to one court, no further application by the same person shall be entertained by the other court. These matters have been discussed in this chapter in Part B.

The chapter also deals with other provisions contained in Sections 395 to 396 which enable an inferior court to consult the High Court on a matter of law in certain circumstances. If a criminal court other than a High Court has to decide whether a particular enactment is constitutionally valid, and is itself of opinion that it is not, but finds that neither the High Court to which the court is subordinate nor the Supreme Court has pronounced on that enactment, the court is required to make a reference to the High Court for the decision on that question. The intention here is that the validity of the laws possibly in conflict with the Constitution should be decided authoritatively and quickly.[1] It has also been provided that a Court of Session or a Metropolitan Magistrate may in its or in his discretion refer for decision to the High Court, any other question of law arising in the hearing of a case pending before such court or Magistrate. These provisions regarding reference to the High Court are contained in Sections 395 and 396 and have been discussed in Part A of this chapter.

A. REFERENCE OF HIGH COURT

25.2 Reference to High Court and post-reference procedure

(x) *Reference to High Court*.—A reference to High Court may be on a question of the constitutional validity of any law or it may be on any other question of law. In this connection Section 395 provides as follows:

Reference to High Court

395. (x) Where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court.

Explanation.—In this section, "Regulation" means any Regulation as denned in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State.

(z) A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it or him to which the provisions of subsection

(1) do not apply, refer for the decision of the High Court any question of law arising in the hearing of such case.

(3) Any Court making a reference to the High Court under sub-section (1) or sub-section (2) may, pending the decision of the High Court thereon, either commit the accused to jail or release him on bail to appear when called upon.

1. *See,* 41s: Report, p. 284, para. 3

Every court subordinate to the High Court is required to make a reference to the High Court under sub-section (i) above, if the following conditions are satisfied:

(a) The court is satisfied that a case pending before it involves a question of the constitutional validity of any Act, ordinance or regulation or any provision contained therein. A mere plea raised by a party challenging the validity of the Act is not sufficient to make a reference to the High Court.[2] What is required is the satisfaction of the court that a real or substantial question regarding the validity of the Act is involved.

(b) The court is also satisfied that the determination of the question of validity of the Act *etc.* is necessary for the disposal of the case before it.

(c) The court is of the opinion that the Act, ordinance or regulation *etc.* is invalid or inoperative but has not been so declared by the High Court to which that court is subordinate or by the Supreme Court.[3]

{*.d}* Before making a reference to the High Court, the court shall state a case setting out its opinion and the reasons therefor.

This is a satisfactory method of deciding authoritatively the question of constitutional validity of the Act etc., although, of course, not many occasions arise for the adoption of this course.[4 *] It may be relevant to note here that Article 2,2.8 of the Constitution also empowers the High Court to withdraw the case from the subordinate court to itself and to dispose of the same after deciding the question regarding the validity of the Act etc. Article 2.28 reads as follows:

> 228. *Transfer of certain cases to High Court*.—If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may— *a)* either dispose of the case itself, or
>
> *(b)* determine the said question of law[7] and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

While Section 395(1} requires *every* subordinate court to refer the question of validity of any Act etc. to the High Court, Section 395(2} gives discretion only to a Court of Session or a Metropolitan Magistrate to refer for the decision of the High Court, any question of law arising in the

2. M. *Rajaram Reddi, re.* 1952 Cri LJ 1235, 1236: AIR 1952 Mad 578.

3. *N. Sttryanarayana* v. *Forest Range Officer,* 1968 Cri LJ 598, 599: v. *Keshab Chandra Naskar,* (1962/ 2 Cri LJ 33, 35: AIR 1962 Cal

A. See, 41st Report, p. 284, para. 32.2.

hearing of the case before such court or Magistrate. Such reference under sub-section (2) can be made only on a question of law and not on a question of fact,[5] The question referred to must have arisen in the hearing of the case. The High Court will not decide the hypothetical questions of law however interesting or important they may *be.*[6] Nor does the sub-section empower a Court of Session or a Metropolitan Magistrate to refer the points of law settled by the decisions of the High Court, where such court or Magistrate doubts the correctness of those decisions.[7] In a recent decision, it has been held that the mere event that the Sessions Judge has entertained an application for revision under Section 379 and called for the record of any case pending in any inferior criminal court will not thereby transfer the pendency of the case to his court and clothe him with jurisdiction and power to make a reference under Section 395(2} on a question of law arising in the hearing of such revision.[8] Sub-section (3) above deals with the powers of the referring court to commit the accused to jail or to release him on bail. This has already been considered in para. 12.9.

(2) *Post-reference procedure*.—When a question has been so referred under Section 395, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the court by which the reference was made, which shall dispose of the case conformably to the said order, [S. 396(1)]

The High Court may direct by whom the costs of such reference shall be paid. [S. 396(2)]

B. Revisional jurisdiction

Sections 397 to 405 relate to powers of revision. While Sections 399, 400 and 401 respectively deal with the powers of revision of a Sessions Judge, an Additional Sessions Judge and the High Court, Section 397 (read with S. 400) empowers these judges and the High Court to call for the records of the subordinate courts for the purpose of exercising the powers of revision, and Section 398 empowers them to order further inquiry under certain circumstances. These sections, particularly Sections 397 to 401, are interlinked and should be read together,

25,3 Power to call for and examine the record of any proceeding before subordinate court
In this connection Section 397 provides as follows:

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397. (1) The High Court or any Sessions judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its ofrevision or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. *Calling for records to exercise of powers*

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

Under the above section, the High Court or the Sessions Court is empowered to call for and examine the record of any proceedings before any inferior court and satisfy itself as to the correctness, legality or propriety of any order passed by the inferior court.[9] ff any defect, irregularity or illegality justifying, corrective action, is found on the examination of the record, the subsequent sections, namely Sections 398 to 401, empower the superior courts to pass suitable orders to remove the miscarriage of justice. The object of revisional jurisdiction is to confer upon superior criminal courts, a kind of paternal or supervisory jurisdiction.[10]

The term "proceeding" as mentioned in Section 397(1) above, cannot necessarily be said to have any reference by itself to the commission or trial of an offence. There are some provisions in the Code itself which are not concerned or necessarily concerned with the commission or prevention of an offence, for instance Sections 125, 126, 133, 144, etc.[11] The word "proceeding" cannot be given such a restrictive significance; a proceeding cannot be said to have any reference by itself to the commission or trial of an offence.[12] [13] "Proceeding" is a very wide term, and would include any judicial proceeding taken before any inferior criminal court even though it may not relate to any specific offence. In several decided cases, it has been held that

4- b 4- ,-4- 4 M /M- 4- b M -k 4-~« 1 44 C 4- b M /N d 4 M /▼ L. 1 4- 4- b M —* 4-~« ^ 44 C 4- b 1 4 4 M

9. *Ishar Singh* v. *State of Punjab*, 1974 Cri LJ 231 (P&H); *Ganesh Narayan*
10. *Purshottam Vijay* v. *State*, 1982 Cri Lj 243, 248 (MP).
11. *Public Prosecutor* v. L. *Ramayya*, 1975 Cri LJ 144, 155 (AP) (FB).
12. *Ujamsbi Govindji Sanghadia* v. *Emperor*, (1947) 48 Cri Lj 152: AIR 1946 Bom 533
13. *Public Prosecutor* v. L. *Ramayya*, 1975 Cri Lj 144, 155—56 (AP) (FB); *E.P. Kumaravel Nadar* v. *T.P. Shanmuga Nadar*, (1940) 41

The word "inferior" in relation to court in Section 397(1} does not carry with it any stigma or any suggestion that the court is under the administrative orders of the superior court. Inferior criminal court only means judicially inferior to the High Court (or Sessions Court). A court is inferior to another court when an appeal lies from the former to the latter.[14] The Sessions judge is, therefore, inferior to the High Court within the meaning of Section 397(1) and the High Court may call for and examine the record of any proceeding before the Sessions judge.[15] It has been held that the Sessions Judge has revisional jurisdiction in relation to appellate judgment of the Assistant Sessions judge and the Chief Judicial Magistrate.[16]

The explanation to Section 397(1) merely clarifies that ail Magistrates, whether executive or judicial, shall be deemed to be inferior to the Sessions Judge for the purpose of Sections 397 and 398. A revision may therefore lie from the order of Additional District Magistrate ordering possession of a room to the landlord, to the Sessions Court.[17] The constitutional position being well-settled that ail the Magistrates are inferior to the High Court and the High Court has got the superintending and supervisory jurisdiction under Article 227 of the Constitution, there was no necessity tor the legislature also to say in the explanation that all Magistrates are inferior to the High Court.[IS] It may, however, be noted that a Magistrate holding an inquiry under Section 176 does not function as a criminal court, and therefore, the records of such an inquiry cannot be called and examined by the High Court under Section 397.[19]

The power of the revisional court to release the offender on bail or bond under Section 397(1) has already been considered in para, 12.8.

From the nature of the powers given to the revisional courts *(i.e.* the High Court or the Court of Session), it seems to follow that the revisional court can act either on its own motion or on the motion of even a stranger who may be instrumental in bringing to the knowledge of the revisional court a matter which otherwise the revisional court may not have known. Of course, the normal course of the High Court or Court of Session to be seized of a matter is either at the instance of the prosecution or the accused or the High Court or Court of Session itself, but in some rare cases

Goenka v. *Corpn, of Calcutta,* {1925) 26 Cri LJ 1533: AIR 1925 Cal 1251; *B.G. Horniman, re,* (193.?) 34 Cri LJ 259: AIR 1933 Bom 59.

14. *Krisbnaji Vithal* v. *Emperor,* (1948) 49 Cri LJ 593: AIR 1949 Bom 29.
15. *Ramacbandra Puja Pa?ida Sam ant* v. *Jambesivar Patra,* 1975 Cri LJ 192;, 1922 (On); *Thakur Das* v. *State of M.P.,* (197S) 1 SCC 27: 197S SCC (Cri) 21, 28: 1978 Cri LJ 1.
16. *Gopala n* v. *State of Kerala,* 1981 Cri LJ 1217, 1224 (Ker).
17. *Ai?inasb Mahanta* v. *jajneswar hi oh ant a,* 1989 Cri Lj 489 (Gau).
18. *Ramacbandra Puja Panda Samant* \\ *jambesivar Patra,* 1975 Cri LJ 1921, 1922-23 (Ori); *see,* observations in *Anjanappa* v. *State of Karnataka,* 1988 Cri Lj 248 (Kant); *Mansur* v. *State of MSP.,* 1986 Cri Lj 57, 59 (MP). The court categorically pointed out in this case that Executive Magistrates are subordinate to the High Court.
19. *Ism at Sara* v. *State of Karnataka,* 1982 Cri Lj 1:076, 1080 (Kant).

information may be received by the High Court or Court of Session even from a stranger. Thus, the revisional court can interfere on information contained in the newspaper or a placard on a wall or on an anonymous postcard, provided it considers that sufficient ground has been established to justify its doing so. At the same time the revisional court has to be loath to take action on an application for revision presented by a third party on its own responsibility and without authority from either of the parties. It becomes the duty of the revisional court to see that a stranger to the proceedings does not employ his information as an instrument of vengeance on the accused or attempt to serve his own private end.[20] The question whether a stranger has a right to appeal in a proceedings initiated suo morn by the court has been answered in the negative. However, the Supreme Court ruled that the stranger's revision petition would be maintainable.[21]

Sub-section (a) of Section 397 bans the exercise of revisional power in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. This provision has been introduced with a view to speeding up the disposal of criminal cases. It was thought that revision petitions against interlocutory orders would not only delay justice but might sometimes defeat it.[22] Therefore, Section 397(2) enacts a statutory bar on the power of revision in relation to any "interlocutory order" and thereby intends to bring about expeditious disposal of criminal cases.[2'] The bar is not however likely to prejudice any party aggrieved by the interlocutory order as such party can always challenge it in due course if the final order goes against it.

What is an "interlocutory order" has not been defined in the Code. A reasonable interpretation of the term would suggest that an "interlocutory order" is one which is passed at some intermediate stage of a proceeding generally to advance the cause of justice for the final determination of the rights between the parties.[24] The test in determining the final or interlocutory nature of an order is one and the same both in civil as well as criminal cases. That test is whether or not the order in question finally disposes of the rights of the parties or leaves them to be determined by the court in the ordinary way. If the order does not finally dispose of the rights of

20. *Pursboitam Vi jay* v. *State,* 1982. Cri Lj 243, 248-49 (MP); see also,

21. See, *K. Sudhakaran* v. *State of Kerala,* (2009) 4 SCC 168: (2009)

22. *See,* notes on Cis. 407-15.

23. *Parmeshwari*

24. *Dhota*

the parties and the matters in dispute and leaves the suit or case still alive suit in which the rights of the parties have to be determined, the order will remain interlocutory irrespective of the stage at which it is passed and also irrespective of the conclusive decision of the subordinate matters with which it deals.[25] The grant or refusal of a bail application is essentially an interlocutory order.[26] But a conflict of opinion with reference to this has however arisen. While the Allahabad High Court has, following the Supreme Court decisions,[27] held[28] that a bail order is an interim order, the Bombay High Court has consistently been holding the view that it is not.[29] In fact, the Supreme Court has mentioned bail order as an example of "interlocutory orders" and the Allahabad High Court gave emphasis on it to arrive at its conclusion. The Bombay High Court has also relied on the observations and discussions in the abovesaid Supreme Court decisions to reach its conclusion.

Having regard to the nature of the bail orders in most criminal cases and the observations of the Supreme Court in *Madhu Limaye* v. *State of Maharashtra*[30] that there are orders which are neither interlocutory nor final, it seems the view of the Bombay High Court is in consonance with the scheme of the Code.

The difference between an application for cancellation of bail and a revision application against a bail order has been succinctly spelt out by the Bombay High Court thus:

> [Wjhen an order is passed by the trial court and the High Court is later on approached for the purpose of cancellation of the bail, the basic postulate is that the order was valid when it was passed, but that on account of supervening circumstances it needed to be varied or modified or cancelled. When you file a revision application against the order granting bail, your grievance is that the order was bad from its inception.[31]

An order passed by a Magistrate under Sections 107/m is nothing but an interlocutory order.[32]

Generally speaking, the test for determining whether an order is of a final or interlocutory nature, is whether or not the order in question finally disposes of the rights of the parties or leaves them to be determined

25. *Bindbasni* v. *State ofU.P.*, 1976 Cri LJ *1660*, 1662 (All); see also, *Parmeshwari Devi* v.
26. *Dbola* v. *State*, 1975 Cri LJ 1274, 1276 (Raj).
27. *AmarNatb* v. *State of Haryana*, (1977) 4 SCC 157: 1977 SCC (Cri) 585: 1977 Cri Lj 1891: AIR 1977 SC 2185
28. *Bhoia v. State ofU.P.*, 1979 Cri Lj 718 (All); *State ofU.P.* v. *Karam Singh*,
29. *R. Shakuntala* v. *Rosbanial Agarival*, 1985 Cri Lj 68 (Bom); *Prasbant Kumar* v.
30. (1977} 4 SCC 551: 1978 SCC (Cri) 10: 1978 Cri LJ 165.
31. *R. Shakuntala* v. *Rosbanial Agarwal*, 1985 Cri Lj 68, 76
32. *Bindbasizi* v. *State ofU.P.*, 1976 Cri LJ 1660, 1662 (AH).

by the court in the ordinary way. The term "interlocutory order" is not to be understood in any broad or artistic sense; it merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties. For instance, orders summoning witnesses, adjourning cases, granting or cancelling bail, calling for reports and such other steps in the aid of the pending proceeding are all interlocutory orders.[33] It may, however, be noted that the expression "interlocutory order" should not be equated as invariably being converse of the expression "final order". There may be an order passed during the course of a proceeding which may not be "final" yet it may not be an interlocutory order—pure and simple. Some kind of order may fall in between the two, and the bar in Section 397(a) is not meant to be attracted to such kinds of intermediate orders. It is, according to the Supreme Court, neither advisable nor possible to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be final, and then to prepare an exhaustive list of those types of orders which fall in between the two.[34] [35] An order rejecting the plea of the accused on a point which when accepted, will conclude the particular proceeding, will not be considered as an "interlocutory order" within the meaning of Section 397(2}.^ But an order taking cognizance came to be treated as final that can be revised under Section 397. One need not resort to Section 482 to quash such orders.[36] There could be no revision of an order framing charge.[37]

According to the Supreme Court, the term "interlocutory order" as used in Section 397(2) has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial, because the bar contained in that section would apply to a variety of cases coming up before the courts not only being offences under the Penal Code, i860 but under numerous Acts. If, therefore, the right of revision was to be barred, the provision containing the bar must be confined within the four corners of the spirit and the letter of the law. In other words, the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi-final.[38]

33. *Amar Nath* v. *State of Haryana,* (1977) 4 SCC 137: 1977 SCC (Cri) 585: 1977 Cri Lj 1891: AIR 1977 SC 2,185; see also. *Hasmukh J. Jhaveri* v. *Sheila Dadlani,* 1981 Cri Lj 958, 962 (Bom).
34. *Madhu Limayev. State of*
35. Ibid. *Ankaputtaswamy* v. *Papegou/da,* 1978 Cri LJ 1233 (Kant); *Amar Nath* v. *State of Haryana,* (1977) 4 SCC 137: 1977 SCC (Cri) 585: 1977 Cri LJ 1891: AIR 1977 SC 2185; *Abdul jabbar Khatt* v.
36. See, *Sanjay Bhandari* v. *State of Rajasthan,*
37. See, *Tejbir* v. *State of Haryana,* (2008} *1* RCR (Cri) 817 (P&H).
38. V.C. *Shukla* v. *State,* 1980 Supp SCC 92: 1980 SCC (Cri) 695, 707: 1980 Cri LJ

If an order is directed against a person who is not a party to the inquiry or trial, and he will have no opportunity to challenge it after a final order is made affecting the parties concerned, then for such a person the order could not be said to be interlocutory. An order may be conclusive with reference to the stage at which it is made, and it may also be conclusive as to a person who is not a party to the inquiry or trial, against whom it is directed.[39] [40]

An order framing a charge has not been considered as an "interlocutory order" within the meaning of Section 397(2,)^° An order rejecting an application under Section 311 for recalling witnesses is an interlocutory order and hence revision is not maintainable against it.[41] [42] [43] In *Valmiki Faleiro* v. *Lauriana Fernandes*[42] [43], the Bombay High Court held that an order directing issuance of process is not interlocutory in nature. However, in *Vardbman Stamping (P) Ltd.* v. *Imp Power LtdS*\ the Gujarat High Court seems to take the opposite view.

The order rendering pardon is a final order so far as the status and liability of the approvers are concerned. The other accused are clearly aggrieved by the order, and as such an order is not interlocutory in the context of Section 357(2), they can go in revision against the same.[44]

It may be noted that the restriction on revisional power in relation to interlocutory order is not applicable in respect of interlocutory order passed without jurisdiction. The reason is obvious. The object of enacting Section 397(2) was that by coming up in revision against interlocutory orders there would be delay in the disposal of criminal proceedings resulting in great harassment to the litigants. If interlocutory orders passed without jurisdiction cannot be interfered with by the revisional court at any earlier stage, then the harassment would be much greater and would be more oppressive. "Interlocutory orders" which are without jurisdiction and are nullities, have no existence in the eye of law. The litigants cannot escape harassment merely by ignoring them and that is why the jurisdiction of the High Court is invoked to quash such orders. Section 397(2)

39. *Parrreshivari*
40. *Madhu L[j]maye* v. *State of Mahar ashtra.* {1977} 4 SCC 551: [978
41. *San]ay* v. *State of*
42. 2°°5 Cri Lj 249S
43. 2°°7 Cri Lj 273
44. *R. Rai'indran Nair*

will have no application to such interlocutory orders which though have the form of interlocutory orders are no orders at all.[45]

A question may arise as to whether the bar put by Section 397(a) on the revision of an interlocutory order can be circumvented by the aggrieved party by invoking the inherent powers of the High Court under Section qSi.[46] Exceptions apart, the answer shall be in the negative. If the order assailed is purely of an interlocutory character, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation wdiich is an abuse of the process of the court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(a) can limit or affect the exercise of the inherent power of the High Court.[47] But such cases would be few and far between. One such case would be the desirability of the quashing of the criminal proceedings initiated illegally, vexatiously or as being without jurisdiction.[48]

Sub-section (3) of Section 397 lays down that if a revision application has been made by any person either to the High Court or to the Sessions Judge under Section 397(1), no further application by the same person shall be entertained by the other of them. Therefore, once the Sessions Judge has passed an order on an application for revision, this order is to be treated as final and no second revision petition lies before the High Court.[49] The decision of the Sessions Judge, if he is approached first, is made final and conclusive (except in case of suo motu revision about which it prima facie appears that the powers of the High Court are not intended to be affected).[50] A person aggrieved by the Sessions judge's decision would have no right to approach the High Court in revision. Such being the position under the (new) Code any rule or practice which requires such a person to first approach the Sessions judge before going to the High Court would

45. *Bkima Naik* v. *State*, 1975 Cri IJ 1923.1930 (Ori); see also, *Decna Nath* v. *Daitari Charan*, 1:975 Cri Lj 1931, 1932 (Ori);
46. S, 482 *is* as fo llows : "Nothing in this C ode shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code,
47. *See*, discussions in *Charanjit Singh* v. *Gursharan Kaur*, 1990 Cri Lj 1264 (P&H); *H.R. Rau-ʳal* v. *Nidhi Srakash*, 1990 Cri LJ 961 (All);
48. *Madhu Lhr.aye* v. *State of Maharashtra*, (1977) 4 SCC 551; 1978 SCC (Cri) TO, 15: 1978 Cri lj T65; MOD v.
49. *Chbaii Das* w *State of Haryana*, 1975 Cri Lj 129, T 30 (P&H); see also, *Rama chandra Sn ja Sanda Sam ant* v.
50. *fagir Singh* v. *Ran Sir Singh*, (1979) 1 SCC 560: 1979 SCC (Cri) 348, 352, 353: 1979 Cri Lj 518; *Chkediial* v. *Rami a.* 1.978 Cri LJ 50 (Ail);

be out of place.[51] However, in a later decision, the Bombay High Court has held that such a rule or practice is not ineffective and purposeless and an aggrieved party cannot directly invoke the revisional jurisdiction of the High Court leapfrogging the Sessions judge.[52]

It may, however, be noted that the restriction on further revision as contained in Section 397(3) is confined to a second revision application filed by the same person only. In Section 397(3) the crucial words are "no further application by the *same person* shall be entertained by the other of them". An illustration would make the position clear. A proceeding under Section 145 between X and Y was terminated before the Magistrate in favour of X. The criminal revision of Y before the Sessions judge was dismissed. A criminal revision before the High Court at the instance of Y shall not be entertained. In the same illustration if Ys criminal revision before the Sessions judge was allowed, a criminal revision to the High Court against the order of the Sessions Judge at the instance of X is maintainable. This is for the simple reason that the second criminal revision before the High Court is not at the instance of such person who filed the criminal revision before the Sessions Judge. On the language of Section 397(3) the conclusion is irresistible that a second revision at the instance of a successful party before a Magistrate who lost the revision before the Sessions judge would lie to the High Court.[53]

25.4 Statement by Metropolitan Magistrate of grounds of his decision to be considered by the court of revision

When the record of any trial held by a Metropolitan Magistrate is called for by the High Court or Court of Session under Section 397, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the court shall consider such statement before overruling or setting aside the said decision or order. [S. 404]

According to Section 355,[54] a Metropolitan Magistrate is required to record specified particulars instead of writing a judgment; and in all cases in which an appeal lies from the final order either under Section 373 (appeal from orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour) or under Section 374(3) *(i.e.* appeals from convictions), the Metropolitan Magistrate is to record a brief statement of the reasons for the decision. The statement submitted

51. *Satyanarayan* v. *Kantilal*, 1976 Cri Lj 1806, 1812. (Guj). See also, *P.*
52. *Arunkumar* v. *CPandanbai*,
53. *Ramachandra Puja Panda Samant* v. *jambesiuar Patra*, 1975 Cri Lj 1921, 192.3 (Ori);
54. *See supra*, para. 2.3.5.

under the above Section 404 supplements the meagre record of the case and helps the court of revision to consider whether the decision of the Magistrate was justified.

Power to order inquiry

25.5

Power to order inquiry

Section 398 provides as follows:

> 398. On examining any record under Section 397 or otherwise, the High Court or the Sessions judge may direct the Chief judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under Section 203 or sub-section (4) of Section 204, or into the case of any person accused of an offence who has been discharged:
>
> Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

The power of the Sessions judge under Section 398 is to examine any record under Section 397 or otherwise, and such power is exercisable to proceedings pending or concluded at the pre-charge stage. While records called for to exercise powers of revision under Section 397 are for the purpose of satisfying the court as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings, the power under Section 398 is not co-extensive with Section 397 but extends far wider as the record can "otherwise" be examined by the Sessions judge without recourse to Section 397.[55] [56] [57]

It is plain from the above section that so far as the orders of dismissal under Section 203[56] [57] or sub-section (4) of Section 204[57] of the Code and of discharge under the relevant provisions of the Code are concerned, the bar provided in Section 397(2) against revision in relation to interlocutory orders has been removed.[58] So long as a dismissal of a complaint could not be said in the eye of law to be one falling under Section 203 [or S, 204(4)], the jurisdiction of the Sessions Judge or the High Court under Section 398 would not come into play [59]

55. *Gurbaksh Singh* v. *Vir Bhan*, 1980 Cri Lj 1154,
56. *See supra*, para. 11.3.
57. *See supra*, para. 11.4.
58. *P.T. Doddiah v. Hanumanthappa*, 1976 Cri Lj
59. *H. Basavaiah* v. *H.G. Krisbnappa*, 1973 Cri LJ

The proviso is imperative and requires that no order for further inquiry should be passed without giving an opportunity to the accused person to show cause why further inquiry should not be directed. It may be noted that the proviso applies only to cases where the accused has been discharged; it does not apply to the dismissal of a complaint. If a Magistrate, on considering the facts, has found that there is no ground for proceeding against any person and, therefore, dismissed the complaint summarily, there is hardly any reason for the revising court to call anyone to court as an accused or as a respondent until, of course, after a further inquiry has been made and that inquiry justifies the issuing of process.[60]

The term "further inquiry" in Section 398 has come to acquire a technical meaning. It does not mean "fresh preliminary inquiry" but only the reappraisal of the very evidence which was examined prior to the passing of the order, which was set aside in revision, or any other evidence cited in the complaint but not examined earlier, but examined after the remand.[61]

It may, however, be noted that once a case is before the Court of Session in its revisional jurisdiction, then the power under both the Sections 398 and 399 can be exercised by it and it is immaterial and academic to investigate as to which specific provision has been actually invoked.[62]

25.6 Sessions Judge's powers of revision

Sessions Judge's called for *powers of revision* which

Section 399 provides as follows:

399. (1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers may be exercised by the High Court under sub-section (1) of Section 401,

(2} Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (x), the provisions of sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

{3} Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

Under Section 399(1) the Sessions Judge, in the case of any proceeding the record of which has been called for by himself under Section 397(1), may exercise all or any of the powers which are exercisable by the High Court

powers conferred on a court of appeal by Sections 386, 389, 391, etc.[6,] And in this view the Sessions Court does not have the power to order summoning of a person discharged by the Magistrate.[63 64] It is interesting to note that though the Sessions Judge has no power to entertain any appeal against an order of acquittal under Section 378, or for enhancement of the sentence under Section 377, he can entertain applications for revision against acquittal or for enhancement of sentence from the complainant or from any person or the aggrieved party. In such cases, the Sessions Judge can invoke revisional jurisdiction even suo motu without any application as such from any person. The Kerala High Court, however, in T. *Jayarajan* v. *P.R Mohammed*[63 64 65] explained that while under Section 401 the High Court can exercise its revisional pow-ers suo motu, the Sessions Court under Section 399 has powers of revision on being approached by a party. As such, the Sessions Court will have power to enhance sentence only on the request of the complainant.

The limitations on the exercise of the revisional powers of the High Court as contained in sub-sections (2}, (3) and {4) of Section 401, and the enabling provision for treating the application for revision as a petition of appeal under certain circumstances as contained in Section 401(5), have all been made applicable by Section 399(2} to every proceeding by way of revision commenced before a Sessions judge under Section 399(1). Section 401 will be discussed in detail in para. 25.8.

As seen earlier, Section 397(3) provides that if an application under Section 397 to call for the records of an inferior criminal court has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. Under Section 399 the Sessions Judges have been given the power to finally dispose of revision cases, the records of which have been called for by them. The motivation of the provisions appears to be to provide an easy remedy and secure expedition in the disposal of cases.[66] So Section 399(3) provides that where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions judge thereon in relation to such a person shall be final and no further proceedings by way of revision at the instance of such person shall be entertained by the High Court. The effect of these two provisions is that, while a person has the choice to move either the High Court or the Sessions Judge under Section 397, if he chooses to go before the Sessions Judge he cannot thereafter go before the High Court even if the Sessions judge rejects his revision application. Therefore, the rule of

63. For the contents of Ss. 386. 389, 390, 391, *see supra*, paras. 2.4.11,
64. *Baldev Singh* v. *State of Haryana*, 1988 Cri LJ 534 (P&H).
65. 1999 Cri Lj 1856 (Ker); also see, *Mahendrabhai R. Patel* v. *Ambalal* P. *Patel*, 2005 Cri Lj 840 (Guj).
66. *Wajid Mirza* v. *Mohd. Ali Ahmed*, 1982 Cri LJ S90, 895-96 (AP).

practice under the old Code that except under exceptional circumstances the High Court would not entertain a revision application unless that Sessions Judge was moved in the first instance, is inconsistent with the scheme of the new Code, *i.e.* the present Code; any insistence on following the old rule or practice hereafter would result in the destruction of the right of a person to move the High Court under Section 397. The rule of practice followed by many High Courts cannot any longer be followed in view of Sections 397(3) and 399(3).[67] However, the Bombay High Court has held that such a rule or practice is not ineffective and purposeless and an aggrieved party cannot directly invoke the revisional jurisdiction of the High Court leapfrogging the Sessions Judge.[63]

Powers of revision of Additional Sessions judge An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge. [S. 400]

25.7

The powers given to Additional Sessions Judge under Section 400 include the power to dispose of an application for condoning the delay in a case transferred to him by the Sessions Judge, even if such an application is filed after the transfer.[67 68 69]

High Court's powers of revision

The powers of revision and the limitations on such powers of the High Court are contained in Section 401 which reads as follows:

High Court's powers of revision

401. (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a court of appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section **39**a.

25.8

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

{3) Nothing in this section shall be deemed to authorise a High Court [67 68 69]

67. *P. Abbu ht* v.

68.

69. *K.M.*

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

Sections 386, 389. 390, 391, and Sections 307 and 392. referred to in the above section have already been discussed in paras *z4.11,* 24.10, 24.11, 17.8, [2]**4**-[1]**3**-

(i) *Powers of High Court in revision.*—The revisional powers of the High Court are very wide. As observed by Woodroffe J, "there is no form of judicial injustice which this court, if need be, cannot reach".[70] Section 397, which is linked up with Section 401, will indicate the circumstances in which the revisional powers might be exercised. The revisional powers are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by any inferior criminal court and even as to the regularity of any proceedings of such inferior court.[71] The object of conferring revisional power on the High Court is to clothe the highest court in a State with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. The error or defect may arise from misconception of law, irregularity of procedure, misreading of evidence, misapprehension or misconception about law or facts, mere perversity or even undue hardship or leniency.[72] Section 401(1} confers on the High Court all the powers of the appellate court as mentioned in Sections 386, 389, 390 and 391; it also empowers the High Court to direct tender of pardon to the accused person as contemplated by Section 307. Apart from these powers the Code has given additional powers in respect of specific cases falling under Sections 106(4), 356(4)) 357(4)) 359(2.), 360(4), etc.[73] Any order passed in any proceedings under the Code, except when it is specifically barred such as an interlocutory order, is revisable by the High Court under Section 401.[74] [75]

A three-judge Bench of the Supreme Court in *Manharibhai Muljibhai Kakadia* v. *Sbailesbbbai Mohanbbai Pate!*[75] has held that in a revision against dismissal of complaint the person complained against has a right

70. *Lekbraj Ram* v. *Debi Pershad*, {1908} 7 Cri Lj 499, 502: {1908) 12 CWN 678, 680; *M.P. Ponnamma* v. *State of Karnataka*, 1978
71. *Mina Ram v.-Jivlu Budhu*, 1974 Cri LJ 718, 719 (HP); *Krishnan* v. *Krisbnaueni,* (1997) 4 SCC 241: 1997 SCC (Cri) 544: AIR 1997
72. *Pratap* v. *State ofU.P.*, (1973} 3 SCC 690: 1973 SCC (Cri) 496, 510: 1973 Cri LJ 565.
73. *See supra*, paras. 23.12, 23.11, 23.13, 23.14, 23.5 *(a).*
74. *Amrutlal* v. *State of Maharashtra*, 1981 Cri LJ 1728, 1729 (Bom).
75. {2012) 10 SCC 517, 533: (2013) 1 SCC (Cri) 218: 2013 Cri LJ 144.

to be heard under Section 401(2), and it is inconsequential whether the order under challenge is at pre-process or post-process stage.

The revisional powers of the High Court under Sections 397 and 401 are entirely discretionary. There is no vested right of revision in the same sense in which there is a vested right of appeal. In an appeal the appellant is given a statutory right to demand adjudication upon a question of law or on a question of fact or on both; but in a revisional jurisdiction the applicant has no right whatsoever beyond the right of bringing his case to the notice of the court and then it is for the court to interfere in exceptional cases where it seems to it that some real and substantial injustice has been done.[76] These sections do not create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognised rules of criminal jurisprudence, and that subordinate criminal courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code.[77]

(2) *Who can invoke the revisional jurisdiction*.—The High Court can exercise its revisional powers suo motu, that is, on its own initiative, or on the petition of any aggrieved party or even on the application of any other person. However, there are two limitations:

(/) As seen earlier, Section 399(3} provides that in a case where any application for revision is made by or on behalf of any person before the Sessions judge, no further proceeding by way of revision at the instance of such person shall be entertained by the High Court.[78]

{ii) In a case where under this Code an appeal lies but no appeal is brought, then, according to sub-section (4) of Section 401, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. The Supreme Court had to deal with such a situation in *K. Ramachandran* v. *V.N. Raj an*[79]. Against an order of acquittal the complainant filed revision. While it was pending, the government's prayer for condonation of delay in filing its appeal was rejected by the Division Bench of the High Court. In these circumstances the court's order of acquittal attained finality and the revision was dismissed. The rule is based on sound policy that a person who has not exhausted his remedies provided by law should not normally be allowed to invoke the revisional jurisdiction of the High Court.

76. *Kerala*
77. *Pranab Kumar Mitra* v.
78. *See supra*, para.
79. (2009} 14 SCC

While courts might have expressed different views on the scope of the bar under sub-section (4) of Section 401, there can be no dispute that the suo motu power of the court is not at all affected by the bar in sub-section {4) of Section 401.[80] It is well known and has been ever recognised that the High Court is not required to act in revision merely through a conduit application at the instance of an aggrieved party. The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law.[81] According to Section 377 only the State Government or the Central Government can file an appeal in High Court for the enhancement of the sentence. That however, does not exclude revisional jurisdiction of the High Court to act suo motu for enhancement of the sentence in appropriate cases under Section 401 read with Section *386{c){iii).* What is an appropriate case has to be left to the discretion of the High Court.[82]

A private party has no *locus standi* in a case instituted on a police report and has no right to demand an adjudication on an application in revision. He cannot claim *locus standi* even if the Public Prosecutor formally permits him to seek revision inasmuch as a Public Prosecutor cannot vest a private party with a right which it has not got under the Code.[83] But it cannot be said that a private party has no right to bring to the notice of the Sessions Judge or the High Court any illegality committed by the subordinate court. There may be exceptional cases in which, on a revision application filed by a private party, revisional jurisdiction may appropriately be exercised. However, while dealing with such a revision application it would not be irrelevant to bear in mind the fact that the court's jurisdiction has been invoked by a private party and that the criminal law is not to be used as an instrument for wreaking private vengeance by an aggrieved party against the person, who according to that party has caused injury to it. Keeping this fact in view if the court finds that there is some glaring defect in the procedure or there is manifest error on a point

80. *State v.Jagatram,* 1973 CriLj 295,298 *{On}; Pratap* v. *State of U.P.,* {1973) 3 SCC 690:1973 SCC (CrL) 496, 510: 1973 Cri LJ 565; *Ramesb Chandra J. Thakkar* v. *Assandas Parmanand Jhaveri,* (1973) 3 SCC 884: 1973 SCC (Cri) 566, 570: 1973 Cri LJ 101;

81. *Nadir Khan* v, *State (Delhi Admn,),* (197*5) 2 Si CC 4-0(3: 1975 SCC (Cri) 622, 624: 1976 Cri Lj 1721, 1722; see also, *Ramesh Chandra J. Thakkar* v. *Assandas Parmanand jhaveri,* {1973} 3

82. *Nadir Khah* v. *State {Delhi Admn.),* (1975) 2 SCC 406: 1975 SCC (Cri) 622, 624: 1976 Cri Lj 1721, 1722; see also, *Pratap v. State of U.P.,* (1973) 3 SCC

83. *Kishan Swaroop* v. *Govt. (NCT of melhi),* (199S) 8 SCC 45 1:1998 SCC (Cri) 1587.

of law and consequently there has been a flagrant miscarriage of justice, revisional jurisdiction should be exercised.[84]

In a case, while the appeal was pending in the Sessions Court a revision application was hied in the High Court by the complainant who also prayed for transferring the appeal from the Sessions to the High Court to be heard along with the revisions. The court rejected the prayer for transfer and ruled that the criminal revision case should be kept pending till the disposal of appeal by the Sessions Court to enable the complainant to pursue the same after the appeals are disposed of by the Sessions Court.[8S]

(3) *How the powers are exercised*.—The exercise of the jurisdiction under Section 401 is discretionary and the powers under Section 401 are to be used only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error on point of law and, consequently, there has been a flagrant miscarriage of justice.[86] The exercise of revisional power is justified only to set right grave injustice and not merely to rectify every error however inconsequential. Merely because the lower court has taken a wrong view of law or misapprehended the evidence on the record cannot by itself justify interference or revision, unless it has also resulted in grave injustice. It is no doubt not possible and is also not practicable to lay down any rigid test of uniform application and the matter has to be left to the sound judicial discretion of the High Court in each case to determine if it should exercise its extraordinary power of revision to set right injustice.[87] It has been held by the Allahabad High Court that revision petition should be disposed of on merits even if the petitioner is not represented by counsel.[88] Ordinarily the High Court, while exercising revisional jurisdiction, would not and does not interfere with the concurrent findings of the courts below on a question of fact; but where the finding is vitiated $o as to cause miscarriage of justice as, for instance, when it is based on no evidence, or where vital evidence has been overlooked or evidence has not been considered in its true perspective, the court will and must interfere.[89] However, in cases where no appeal is provided against

84. *Rajendra Prasad* v. *State of Bibar*, 1975 Cri LJ 172,5, 172.7 (Pat); see also, *Thakur Ram* v. *State of Bihar*, 1966 Cri Lj 700, 706: AIR 1966 SC 911; *K. Cbinnasivamy*

85. A. *Jogi Naid*uv. *K9)/alada Venkataramana*,

86. *Amur Chand* v. *Shanti Bose*, {1973} 4 SCC ro: 1973 SCC (Cri) 651, 658: 1973 Cri LJ 577, 583; *Rajaram Gupta* v. *Dharamchand*, 1983 Cri LJ 612, 614 (MP); *N(train Prasad*

87. *Pratap* v. *State 8fU.P.*, (1973) 3 SCC 6 <10: 1973 SCC (Cri) 496, 510: 1973 Cri LJ 565, 575;

88. *Mithaee Lal* v. *State of U.P.*, 2009 Cri LJ 612

89. *Dhani Ram* v. *State*, 1976 Cri LJ 152, 153 (JScK); see also, *Esakki Thevar*, *re*, 1960 Cri LJ 354: AIR 1960 Mad 115; *Ram Kishore*

the order of conviction and sentence (or against any other final order of the subordinate court), and a revision petition is the only remedy on account of the limitations contained in the Code, the court of revision will be more careful in appreciation of evidence. However, the High Court would not be justified in relying upon the documents other than those referred to in Sections 239 and 240. Nor would it be justified in invoking Section 482 except in rare cases where forensic exigencies and formidable compulsions justify such a course. The Supreme Court has held that only unimpeachable documents alone should be looked into while exercising revisional jurisdiction.[90] Thus, it is true that the revisional jurisdiction in its scope does not postulate re appreciation of evidence. In a revision at the instance of a private party, the court exercises only a limited jurisdiction and it cannot act as an appellate court.[91] Thus, questions of fact cannot be looked into by the High Court in its revisional jurisdiction.[92] Furthermore, a plea of fact not raised before the trial court cannot be gone into for the first time in revisional jurisdiction.[93] That, however, is an aspect which must be appreciated in the light of the limitation on the right to go in appeal.[94]

While exercising the powers of revision the High Court has to work under two statutory limitations:

(z) As mentioned earlier in Section 397(2} the powers of revision shall not be exercised in relation to any interlocutory order passed by any inferior criminal court in any appeal, inquiry, trial or other proceeding. This has already been discussed in para. 25.3.

(ii) It has been made clear by Section 401(3} that the High Court exercising its revisional jurisdiction under Section 401 shall have no authority to convert a finding of acquittal into one of conviction.

Section 401(1) provides that in the exercise of the revisional jurisdiction the High Court may exercise any of the powers conferred on the court of appeal. As the court of appeal is entitled under Section *386(a)* to reverse an order of acquittal or to direct a retrial, the High Court in the exercise of its revisional powers would also be entitled to record a conviction by reversing the order of acquittal. But sub-section (3) of Section 401 prohibits the High Court from converting a finding of acquittal into one of conviction. Therefore, it is incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding

Hussain, {1973} 2 SCC 406: 1973 SCC (Cri) 82.8: 1973 Cri IJ 1176; *Jagtr Kaur* v. *jaswant Singh*, (1963) 2 Cri LJ 413, 417: AIR 1963 SC 15Z1.

90. *Minakshi Bala* v. *Sudhir Kumar*, (1994) 4 SCC 142: 1994 SCC (Cri) IT81.
91. See, *Dharam* v. *State of Haryana*, 2009 Cri LJ (NOC) 49 (PStH).
92. *Kanik Lai Thakur* v. *State of Bihar*, 2003 Cri LJ 375 (Pat).
93. *Mahesh Mehta* v. *State of Goa*, 2006 Cri LJ 1142 (Bom).
94. *Islamuddin v. State*, 1975 Cri LJ 841, $42 (Del).

of acquittal into a finding of conviction,[95] This places limitations on the power of the High Court to set aside a finding of acquittal in revision, particularly when the State had not thought fit to appeal to the High Court against the finding of acquittal and when the High Court is exercising the revisional jurisdiction at the instance of the private parties. In a number of decisions, the Supreme Court has held that the revisional power of the High Court to set aside the order of acquittal at the instance of the private parties should be exercised only in *exceptional cases* where there is some glaring defect in the procedure, or there is a manifest error on a point of law and, consequently, there has been a flagrant miscarriage of justice.[96] In *K. Chinnaswamy Reddy* v. *State of A.R.*[97] *{K. Chinnaswamy Reddy)*y the Supreme Court has observed:

It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439.[98] It would follow from the above that where an acquittal is based on the compounding of an offence and the compounding is invalid under the

95. *K. Chinnaswamy Reddy* v.
96. *K. Chinnaswamy Reddy* v. *State of A.P.,*
97. (1963) 1 Cri Lj 8:
98. *Ibid,* 12 {CriLj}.

law, the acquittal would be liable to be set aside by the High Court in the exercise of its revisional jurisdiction.[1][2][3][4]

The Supreme Court in *Pyla Mutyalamma* v. *Pyla Suri Demudu*[2] examined the nature of revisional jurisdiction and pointed out that the High Court cannot interfere with positive finding in favour of marriage and parentage of children but where finding is negative, the High Court could entertain revision, re-evaluate evidence. It was further pointed out that the revisional court can interfere only if there is any illegality in order or there is any material irregularity in procedure or on error of jurisdiction.

The instances mentioned by the Supreme Court (given above) in the *K. Chinnaswamy Reddy case* as justifying interference with order of acquittal in the exercise of revisional powers are only illustrative and not exhaustive. Criminal justice system does not admit of "pigeon-holing". When a court starts laying down rules enumerated (i), (z), {3), (4} or *{a), (b),* (c), *(d),* it is arranging for itself traps and pitfalls.[3][4]

The Supreme Court in *Sbeetala Prasad* v. *Sri Kant*[4] reiterated that revisional jurisdiction can be exercised by the High Court at the instance of a private complainant in exceptional cases:

1. where the trial court has wrongly shut out evidence which the prosecution wished to produce;
z. where the admissible evidence is wrongly brushed aside as inadmissible;
3. where the trial court has no jurisdiction to try the case and has still acquitted;
4. where the material evidence has been overlooked either by the trial court or the appellate court, or the order is passed by considering irrelevant evidence; and
5. where the acquittal is based on the compounding of the offence which is invalid under the law.

In yet another case,[5] the acquittal recorded by a Sessions Court was reversed and the accused was convicted by the High Court, acting on the letter from a prosecution witness, by treating it as a criminal revision petition. The State did not elect to appeal. The Supreme Court disapproved the act of the High Court and reiterated the law thus:

1. *Ramesh Chandra J. Tkakkar* v\ *Assandas Parmanand Jhaueri,* (1973} 3
2. (2011) 12 SCC 189: {2012} *1* SCC (Cri) 371: 2012 Cri LJ 660.
3. *Ay*
4. (2010) 2 SCC 190:
5. *Vimal Singh* v. *Khuman Singh,* (1998} 7 SCC 223: 1998 SCC

No doubt, the High Court in exercise of its revisionai power can set aside an order of acquittal if it comes within the ambit of exceptional cases enumerated above, but it cannot convert an order of acquittal into an order of conviction.

The only course left to the High Court in such exceptional cases is to order retrial.[6]

If a retrial is directed in exercise of revisionai powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial.[7]

(4} *Audi alteram partem*.—No man should be condemned unheard. The Code substantially accepts and follows this principle in all stages of criminal proceedings. The rule contained in Section 403 is apparently

mcfodsant aw[i]totih[h]rwaJso[v]expFe**3**§ii?[l]pr(ivitieaeij[n‹;(]Mi[l]§[i]s!<eaey n^aftaffiarmy entighntteaJe Steitisd efrohetros'eroially or by the pleader before any Court exercising its powers of revision; but the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader.

The opening words "save as otherwise provided by this Code" are crucial and help ro save the basic principle audi alteram partem. As seen earlier, the proviso to Section 398 does not allow a revisionai court to direct further inquiry against any person who has been discharged, unless such person has had an opportunity of showing cause why such direction should not be made,[8] [9] [10] Similarly, Section 40.1(2} provides that the revisionai court shall not pass any order to the prejudice of the accused or other person, unless he has had an opportunity of being heard either personally or by pleader in his own defence. This sub-section (2} to Section 401 is imperative and can be considered as an exception to Section 403. Where the High Court in exercise of the revisionai jurisdiction radically altered the character of the punishment awarded by the lower court without issuing notice to the accused to show cause against such alteration, the High Court was held to be in error and its order was set aside and the case was sent back for disposal according to law.[9] [10] Where, however, the accused had in fact received full opportunity of showing cause against his conviction and sentence, and no prejudice had been caused to him by reason of omission of a notice under Section 401(2), the order of the revisionai court would not be vitiated by the absence of notice to the accused person.[30]

6. *ibid*,
7. *Satyajit*
8. *See*
9. *Jangal Prasad* v.
10. *Jayaram Viiboba* v. *State of Bombay*, 1956 Cri Lj 318, 321-22: AIR

To a certain extent, Section 403 is an exception to the general rule "audi alteram partem" in that it provides that in "revision" no party has a "right" to be heard. The section does not, however, violate the principle of natural justice. What is required by the principle is that a party must have an opportunity of presenting his case or showing cause against the order. It is, however, not necessary that a party must be heard either personally or through his pleader.[11] [12] [13]

However, the courts have been trying to observe "audi alteram partem". In a case,[12] [13] where the order of discharge passed by a Chief Judicial Magistrate was reversed by the Sessions Judge. But the High Court reversed the Sessions Judge and affirmed the order of discharge in revision. When this order was challenged the High Court recalled the order. When this recalling was challenged on the basis of Section 36a, the court responded:

There is a distinction between review and recalling of the order... . It is well settled that where a petition under Section 482 of the Code has been filed for recalling the order of the Court on the ground that the opposite party has not been heard, the petition is maintainable. Section 362 does not impose any prohibition for recalling the order.[15] Section 401 read with Section 3 8 6(c) (in) confers a power on the High Court to enhance the sentence in appropriate cases while exercising the powers of revision.[14] However, Section *386(c)(iii)* is linked up with Section 377; and sub-section (3) of Section 377 requires that the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the *accused may plead for his acquittal or for reduction of the sentenced*[5] Therefore, it necessarily follows that when the question of enhancement of the sentence comes before the revisional court {which may be the High Court or a Court of Session), the extent of the right of the accused to be heard will be the same as given by subsection {3) of Section 377. This right of the accused under Section 377(3) and Section 401(2} is not affected by the prior dismissal of his appeal against the conviction. There is nothing in the Code that conditions or controls this right. The principle of finality of judgments of appellate courts as mentioned by Section 393[16] cannot be invoked against the abovesaid right of the accused because Section 393 itself says that its operation shall

11. *Kerala Transport Co.* v. *D.S. Soma Shekar*, 1982 Cri LJ 1065,
12. *Gulam Ahmed* v. *Haji Maulana Mohammed Z a ho or*, 1997 Cri
13. *Ibid*, 3838.
14. *Nadir Khan* v. *State {Delhi*
15. For the text of S. 377(3}, *see supra*, para. 24.4.
16. For the text of S. 393, *see supra*, para, 24.17.

not affect the provisions of Section 377 or the provisions of Chapter XXX of the Code dealing with revision.[17]

In a case in which as a result of plea bargaining the accused was induced or led to plead guilty under a promise or assurance that he would be let off lightly and a light punishment was in fact passed by the trial court, it would be violative of Article 21 of the Constitution to enhance the sentence in appeal or revision. This is not to suggest that the court of appeal or revision should not interfere where a disproportionately low sentence is imposed on the accused as a result of plea bargaining. But in such a case, it would not be reasonable, fair and just to act on the plea of guilty for the purpose of enhancing the sentence. The court of appeal or revision should, in such a case, set aside the conviction and sentence of the accused and remand the case to trial court so that the accused can, if he so wishes, defend himself against the charge and if he is found guilty, proper sentence can be passed against him.[18]

{5} *Treating application for revision as a petition of appeal.*—If an application for revision has been made to the High Court by any person in a case where an appeal lies, and the High Court is satisfied that the revision application was made under the erroneous belief that no appeal lies thereto, the court may treat the revision application as a petition of appeal and deal with the same accordingly. [S. 401(5)] This is a salutary provision as it prevents miscarriage of justice that might be caused due to bona fide mistake on the part of the person seeking a remedy in higher courts. The purpose of all rules of procedure obviously is to enable justice to be done. As such every procedure which advances the dispensation of justice should be considered permissible unless it is prohibited.[19]

In a case where the revision petition was filed within the period of limitation prescribed for filing an appeal, the High Court may treat the revision petition as an appeal under Section 401(5) in appropriate circumstances.[20]

(6) No abatement of revision by death of the petitioner.—The revisional powers of the High Court vested in it by Section 401 read with Section 397 do not create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognised rules of criminal jurisprudence and that the subordinate criminal courts do not exceed their jurisdiction or abuse their powers

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vested in them by the Code.[21] Therefore, whether it was an accused person or it was a complainant who has moved the High Court in its revisional jurisdiction and the revision petition has been admitted, the matter has to be heard and determined in accordance with law, whether or not the petitioner is alive or dead or whether he is represented in court by a legal practitioner. In hearing and determining cases under Section 401, the High Court discharges its statutory function of supervising the administration of justice on the criminal side. Hence the considerations applying to abatement of an appeal under Section 394[22] may not apply to the case of revisional applications.[23]

In a proper case, the High Court can exercise its powers of revision in respect of an order made against an accused person even after his death.[24] The revisional power, it is submitted, can be exercised not only when a convicted person dies pending the hearing of his application, but also on an application filed after the death of the convicted person by any of his heirs, if in the opinion of the court such exercise of the powers is called for to do justice in the case.

Power of High Court to withdraw or transfer revision cases

25.9

Power of High Court to withdraw or transfer revision cases

In this connection Section 402 provides as follows:

> 402. (1) Whenever one or more persons convicted at the same trial makes or make application to a High Court for revision and any other person convicted at the same trial makes an application to the Sessions judge for revision, the High Court shall decide, having regard to the general convenience of the parties and the importance of the questions involved, which of the two Courts should finally dispose of the applications for revision and when the High Court decides that all the applications for revision should be disposed of by itself, the High Court shall direct that the applications for revision pending before the Sessions Judge be transferred to itself and where the High Court decides that it is not necessary for it to dispose of the applications for revision, it shall direct that the applications for revision made to it be transferred to the Sessions judge.
>
> (2) Whenever any application for revision is transferred to the High Court, that Court shall deal with the same as if it were an application duly made before itself.
>
> (3) Whenever any application for revision is transferred to the Sessions Judge, that Judge shall deal with the same as if it were an application duly made before himself.
>
> (4) Where an application for revision is transferred by the High Court to the Sessions Judge, no further application for revision shall lie to the

21. ***Pranab Kumar Mitra*** v. ***State*** of VLB., 1959 Cri Lj 2.56, ***z60:*** AIR
22. For the text of S. 394, *see supra*, para. 24.18.
23. *Pranab Kumar Mitra* v. *State of*
24. *State of Kerala* v. *Narayani*

Court or to any other Court at the instance of the person or persons whose applications for revision have been disposed of by the Sessions judge.

In case of joint trial, if one of the several accused persons moves the High Court and any other accused person moves the Sessions Court on the same matter in revision, there would be a conflict of jurisdiction. In order to avoid such a situation, it has been provided that the High Court in such circumstances should decide as to which of the two courts should deal with the matter, having regard to the general convenience of the parties and the importance of the questions involved. If the High Court transfers the revision petition to the Sessions judge and it is disposed of by that court, no further revision shall lie to the High Court

25.10 High Court's order to be certified to lower court

Section 405 provides as follows:

High Court's order to be certified to

405. When a case is revised under this Chapter by the High Court or a Sessions Judge, it or he shall, in the manner provided by Section 388, certify its decision or order to the Court by which the finding, sentence or order revised was

Chapiter 26

Transfer of Cases

Object and scope of the chapter **26**.

Earlier, in Chapter 14, while dealing with the requirement of "courts to be independent and impartial", it was considered how the transfer of a case might become necessary to secure fair and impartial trial. Sections 407(1), 406(1) and 408(1) were also referred to in this context.[1] If an accused person has *reasonable cause* to believe that he may not receive as fair trial at the hands of a particular judge, he should have the right to have his case transferred to another court. The principle is unobjectionable[2] and has been widely recognised. The present chapter considers in detail the provisions contained in Sections 406 to 41 z which in essence give effect to the above principle and also provide for safeguards against their possible misuse. The provisions contained in this chapter also deal with such transfers of cases as are expedient for the ends of justice or as will tend to the general convenience of the parties or witnesses, and other ancillary matters.

The chapter contemplates seven types of transfers: 1) the Supreme Court making transfers of cases from one State to another State; [S. 406] %} the High Court making transfers in the State from one court to another court of equal or superior jurisdiction or to itself; [S. 407] 3) a Sessions judge transferring cases or appeals from one court to another in his sessions division; [S. 408] 4) a Sessions judge recalling or withdrawing cases from Additional Sessions judge or Assistant Sessions judge or Chief Judicial Magistrate; [S. 409] 5) Chief Judicial Magistrate withdrawing or recalling a case from any Magistrate subordinate to him; [S. 410(1)] 6) any Judicial Magistrate recalling a case made over by him to another Magistrate

1. *See supra*, para. 14.2,*{d).*
2. *See,* observations in 41st

under Section 192(2); [S. 410(2}] 7) making over or withdrawal of cases by Executive Magistrate *i.e.* District Magistrates and Sub-Divisional Magistrates. [S. 411]

All these matters will be discussed in the succeeding paragraphs of this chapter.

26.2 Transfer of cases and appeals by Supreme Court Section 406 provides as follows:

Power of Supreme Court to transfer cases and appeals Hig[h]

406. (i) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any rticular case or appeal be transferred from one High Court to another Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

{%) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.

The Supreme Court has been given under this section very wide discretionary power to transfer cases and appeals from one High Court to another High Court or from a criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court. The Supreme Court can exercise the power whenever it considers it expedient to do so for the ends of justice.[3] The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested. The words "party interested" would normally include the complainant, the public prosecutor, and the accused and may even cover a person lodging the first information report.[4] In *Nahar Singh Yadav* v. *Union of India*[5], the Supreme Court upheld the locus standi of the CBI to maintain transfer petition and

See, *Ayyannar Agencies* v. *Sri Vishnu Cement Ltd.*, (2000) 10 SCC 596: 2001 SCC (Cri) 15U: 2000 Cri LJ 2472.

'*ag Bhusan* v. *State,* (1962) 1 Cri Lj 703: AIR 1962 All 288; *N.C. Bose* v. *Probodb Dutta Gupta,* 1955 Cri Lj 923: AIR 1955 Ass 116; *Jupalli Rajagopala* Rao *v. Putheli Narayana Reddi,* {1929} 30 Cri LJ 1163: AIR 1929 Mad 844; *Rajendranarayan* v. *Bhagaban Mahapatra,* AIR 1947 Pat *16&; Punyananda v. State,* 1970 Cri LJ 80S, 808: AIR 1970 Cal 241; *Shivasharan Reddy v. State,* 1968 Cri Lj 638, 640: AIR 1968 Mys 119; *Naps Agha* v. *State,* 1979 Cri LJ 1097 (All).

(2011} 1 SCC 307: (2011) 1 SCC (Cri) 39.

spelt out the broad factors which could be kept in mind while considering an application for transfer of the trial:

> {z} when it appears that the State machinery or prosecution is acting hand in glove with the accused and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution; *(it)* when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant; *(Hi)* comparative inconvenience and hardships likely to be caused to the accused, the complainant/prosecution and the witnesses, besides the burden to be borne by the State exchequer in making payment of travelling and other expenses of the official and non-official witnesses; *(iv)* a commonly surcharged atmosphere indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and *(v)* existence of some material from which it can be inferred that some persons are so hostile that they are likely to interfere either directly or indirectly with the course of justice.

The power shall be exercised if there is a reasonable apprehension on the part of a party to the case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. To judge the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.[6] It may be noted that the central criterion for directing a transfer is not the hypersensitivity or relative convenience of a party. Something more substantial, more compelling, more imperilling from the point of view of public justice is necessary for directing a transfer.[7] For instance, if in a certain court the whole Bar for any reason refuses to defend an accused person, or if there are persistent turbulent conditions putting the life of the complainant or the accused in danger or creating chaos inside the court hall, or if there is general atmosphere of tension vitiating the necessary neutrality to hold

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a detached judicial trial, a transfer of the case would be justified.[8] If a Magistrate chooses to make an affidavit challenging the transfer application made by an accused person whose case is pending in his court, makes the said affidavit on behalf of the Administration, and in the affidavit puts in a strong plea opposing the transfer, all essential attributes of a fair and impartial criminal trial are immediately put in jeopardy. In the circumstances such an affidavit in itself becomes a valid ground for transfer of the case from his court, and even without considering the merits of the contention raised by the petitioner the Supreme Court would think it expedient to transfer the case from that Magistrate's court.[9]

In *Bhiaru Ram* v. CJ3l[10 11 12], the court noted that the petitioner was seeking transfer of case to suit his convenience and so cannot be allowed. But in *Lalita* v. *Kulwinder Kumar*[11], the Supreme Court allowed a transfer as this petitioner was unable to bear the cost of travel having two minor school going children and being sick.

The Supreme Court in *Sbree Baidyanath Ayurved Bhawan (P) Ltd.* v. *State of Punjab*[12A] reiterated that before an order of transfer is effected, the convenience not only of the petitioner but also of the prosecution, other accused and witnesses including the larger interests of society should also be taken into consideration under Section 406, Criminal Procedure Code, 1973 (CrPC).

Section 406 does not clothe the Supreme Court with the power to transfer investigations from one police station to another in the country simply because the first information or a remand report is forwarded to a court.[13]

Though the Supreme Court in 1984 withdrew a case involving corruption from the special judge appointed under the Criminal Law Amendment Act, 1952 and transferred[14] it to the Bombay High Court with a request to assign it to a sitting judge of the High Court in 1988 the Supreme Court reviewed the ruling and held that its earlier order was wrong.[15]

26.3 Transfer of cases and appeals by High Court

(i) *Circumstances in which High Court may order transfer of a case or appeal.*—The High Court may order transfer of a case whenever it is made to appear to the High Court:

8. *Maneka Sanjay Gandhi* v. *Rani Jethmalani*, {1979} 4 SCC 167: 1979 SCC (Cri) 934, 936: 1979 Cri LJ 458;
10. *Jahid Shaikh* v. *State of* (2010} 7 SCC 799:
11. (2007} 15 SCC
12. (2009) 8 SCC
13. *Ram Chander Singh*
14. *R.S. Nuyak v. A.R. Antulay*, (19S4) 2 SCC 183: 1984 SCC (Cri)
15. A.R. *Antula)/* v. *R.S. Nayak*, (1988) 2 SCC 602: 1988 SCC (Cri)

(a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this Section *[i.e.* S. 407] is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice. [S. 407(1)]

The above provision of the section is not exhaustive and it has been held that apart from the susceptibilities of the accused, if circumstances exist or events happen, which are calculated to create in the mind of the accused a reasonable apprehension that he will not be fairly treated at his trial, the transfer of the case should be made.[16] In an appeal where after the arguments were heard but during the hearing of the application of the accused for recording additional evidence, the judge expressed an opinion that the accused should not only be convicted but deserved deterrent sentence, it was held that the expression of such opinion by the judge at that stage provided a basis for a reasonable apprehension in the mind of the accused that he might not have a fair decision from the judge, and that it would be undoubtedly expedient in the interest of justice to order transfer.[17] In a case 'where no lawyer in the district was willing to act for the accused, it is a good ground for transfer of the case to another district.[18] [19] A transfer of a case will be justified if it tends to the general convenience of the parties or witnesses.[13] [19]

In a case the petitioner prayed for transfer as two of the respondents had been visiting the Additional Sessions judge and they had been threatening him with a view to securing a compromise of the case. The Additional Sessions judge denied the allegation and the petition was accordingly dismissed. But when the petitioner appeared in the court the judge said that he would do what was necessary to correct the persons. He also issued non-bailable warrants against the petitioner's wife and sister and refused bail as they did not turn up for giving evidence. Two respondents were also discharged. The Madhya Pradesh High Court ruled that these circumstances were sufficient to create doubt in the petitioner's mind as to the impartiality of the judge. The High Court therefore ordered transfer of the case.[20]

While considering the transfer of a case, the apprehension in the mind of a party that he may not get a fair trial, is one very important factor. However each and every imaginary apprehension cannot be the

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17. *Adam Basha* v. *State of Karnataka,* 1975 Cri Lj 744

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19. *Public Prosecutor* v. *D.V, Reddy,* 1976 Cri Lj 1252

20. *Shambhoo Dayal* v. *State of M.P.,* 1985 Cri LJ 638

foundation of a transfer of a case. The party has to show that its apprehension is reasonable. To judge the reasonableness of the apprehension the state of mind of the party who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.[21] It is undoubtedly true that justice should not only be done but should also appear to have been done, but along with it, it must be observed that there should not be any unreasonable, impracticable impression in the mind of the public about the honesty and integrity of the judiciary.[22] [23] [24] Apprehension that witnesses may not give evidence fearlessly and public prosecutor appointed may not discharge his duty impartially is a reasonable apprehension.[23] [24] Lack of territorial jurisdiction of the court that has taken cognisance of an offence furnishes a ground for transfer of a case.[21] A plea for merging a case with another case pending against the accused at another place could be a sound ground for transfer of a case.[25] Where a complaint case and a police case are filed on the same facts and the parties and the offences are the same the complaint case can be directed to be transferred to court where the police case was pending so that both cases could be tried together.[26] However mere apprehension of a surcharged atmosphere without there being proof of inability of holding fair and impartial trial cannot be made a ground for transfer of a case either under Section 406 or 407.[27] Furthermore, apprehension of physical harm, threat or intimidation from opposite party has been held to be too nebulous a ground for transferring cases.[28] Transfer of a criminal case is permitted by the Code to enable a party to have an independent judgment.[29] In a case where personal charges were levelled against the Magistrate in the transfer application and he took exception to such charges and expressed his disapproval in strong language, that by itself would not go to indicate that he was prejudiced against the accused and a transfer in such a case is not called for[30]. The provisions relating to transfer of criminal cases cannot also be

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22. *K. Ibocha Singh* v. *K. Ii)obi Singh*, *1976* Cri LJ1305 , 1308 (Gau); see also, *Gangadhar Marar v. State*, 1972 Cri LJ 954 (Ker).

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utilised to have case heard by a particular judge as such a situation may be contrary to the very intention of institutionalising the provision for transfer of cases.[31] [32]

There may be cases in which transfers would be necessary by the other provisions of the Code, for instance, cases covered under Section 191[52] or Section 479.[31] [32] [33] [34] These will be covered by clause *(c)* of Section 407(1) above.

In *Fatima Riswana* v. *State*[34], the Supreme Court was called upon to decide propriety of a Madras High Court ruling transferring a criminal case dealing with pornography and sexual exploitation and indecent exposure of women from a *mahila court* presided over by a lady judge, to a court presided over by a male judge. The court found it improper to permit the transfer on the presumption that the proceedings would cause embarrassment to the lady judge.

(z) *At whose instance the powers of transfer are exercised.*—The High Court may act either on the report of the lower court or on the application of a party interested, or on its own initiative. [S. 407(1)] However no application shall lie to the High Court for transferring a case from one criminal court to another criminal court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him. [proviso to sub-s. (1), S. 407] But it has been held that this prohibition in the proviso to Section 407(2) will have application only in cases where the Sessions Judge has the power to transfer. In a case where the Sessions Judge has no power of transfer no question of moving the Sessions Judge for transfer arises.[35]

The words "party interested" would normally include the complainant, the public prosecutor, and the accused and may even cover a person lodging the first information report (FIR).[36]

The High Court can act suo motu transfer the case.[37] But this power should be exercised after hearing the parties.[38] In a case wherein a judge accepted prayer for transfer at his camp office and ordered transfer without hearing the other party, the Supreme Court struck down the transfer

31. H.M. *Chandregowda* v. *State of Karnataka*, 2001 Cri LJ 2710 {Kant}.
32. For the text of S. 191, *see supra*, para. 10.3(a).
33. For the text of S. 479, *see supra*, para. 14.2(c).
34. (2005} 1 SCC 5S2: 2005 SCC (Cri) 427: 2005 Cri Lj 900.
35. *State of Kerala* v. *Reny George*, 1981 Cri LJ 1352. 1354 (Ker); *Gundi Sahu* v. *State of Orissa*, 1975 Cri LJ 1592
36. *Jag Bhusan* v. *State*, (1962) 1 Cri LJ 703: AIR 1962 All 288; *N.C. Bose* v. *Probodb Dutta Gupta*, 1955 Cri LJ 923: AIR 1955 Ass it6; *Jupailt Rajagopala Rao* v. *Futbeli Narayana Reddi*, (1929) 30 Cri Lj 1163: AIR 1929 Mad 844;
37. *Ahmed Moideen* v. *Inspector ofD' Dioision*, 1959 Cri Lj 731, 740: AIR 1959 Mad 261.
38. *Nirmal Singh* v. *State of Haryana*, (1996) *6* SCC 126: 1996 SCC (Cri) 1122.

order,[59] In yet another case where the appeal of the accused against conviction was pending in the court of session and the High Court, not knowing of this appeal, suo motu called for the record of the proceeding from the Magistrate's court and issued a rule against the accused to show cause why the sentence should not be enhanced, and then after knowing about the appeal made an order transferring the pending appeal to itself and disposed of the case itself, it was held that the High Court was entitled to do so.[39] [40]

In the circumstances mentioned in the proviso to Section 407(2), an application to the Court of Session first is imperative.[39] [40] [41] However an application made directly to the High Court to commit a case pending before a sub-divisional Judicial Magistrate to the Court of Session on the ground that it was only a counter case of another case pending before the court of session is maintainable even though no application was made to the Court of Session under Section 407(2) before moving the High Court. Because there is no provision in the Code for the Sessions Court to direct commitment of cases pending before Subordinate Magistrates to the Court of Session, and so the proviso to Section 407(2) will not apply to such cases.[42] It was held in a case that it is impermissible for a High Court to transfer a case from one of its subordinate courts to another court in other State.[43] It is also improper on the part of a High Court to transfer a case, which is in the final stages of trial, from one court subordinate to it to another one.[44]

(3) *Procedure to be followed*.—Every application for an order under sub-section (1) of Section 407 above shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation. [S. 407(3)]

The object of an affidavit in support of an application for transfer is that there is a prima facie evidence in support of the allegations contained in the application and that these allegations are not made recklessly. The affidavit must be in accordance with the provisions of Section 297.[45] Since no evidence is recorded in case of transfer applications, the importance of an affidavit conforming to the provisions of Section 297 is not capable of over exaggeration.[46]

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When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under subsection (7) of Section 407.[47] [S. 407(4)]

Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least 24 hours have elapsed between the giving of such notice and the hearing of the application. [S. 407(5)]

(4) *Stay of proceedings of the subordinate court.*—Where the application is for the transfer of a case or appeal from any subordinate court the High Court may, if it is satisfied that it is necessary to do so in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate court shall be stayed, on such terms as the High Court may think fit to impose. [S. 407(6)] However such stay shall not affect the subordinate court's power to remand under Section 309.[48] [proviso to sub-s. (6), S. 407]

Stay of proceedings in the subordinate court pending the disposal of the application for transfer can be secured by obtaining an order from the High Court.

Section 309 which deals with power of the subordinate court to postpone or adjourn proceedings has been left unaffected by the proviso to Section 407(6). According to Section 309 the proceedings in a case can be adjourned or stayed if there are reasonable and adequate grounds to do so. When a transfer application is made on the ground that the petitioner has reason to believe that he may not receive a fair trial at the hands of a particular judge, the proceedings should not thereafter be continued before such judge, during the pendency of the disposal of the transfer application in the higher court. Therefore either the High Court under Section 407(6) or the lower court under Section 309 should accordingly stay the proceedings unless the transfer application is made without any reasonable cause and is only an abuse of the legal process.

(5) *Orders that the High Court can pass.*—Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case. [S. 407(7)]

This is a salutary provision as it will be useful, at least to some extent, as a safeguard against frivolous or vexatious transfer applications.

If such an application is not dismissed the High Court may order:

47. For the content of sub-s, (7), S. 407, *see infra*, para.

48. For the text of S. 309, *see supra*, para. 16.3.

(i) that any offence be inquired into or tried by any court not qualified under Sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal or class of cases or appeals, be transferred from a criminal court subordinate to its authority to any other such criminal court of equal or superior jurisdiction;

(Hi) that any particular case be committed for trial to a Court of Session; or

{iv) that any particular case or appeal be transferred to and tried before itself. [S. 407(1)]

Sections 177 to 185 referred to in clause *(i)* above deal with the place of inquiry or trial. Clause *(i)* enables the High Court to transfer a case and order any offence to be inquired into or tried by any court not qualified under Sections 177 to 185 *(i.e.* not having territorial jurisdiction) but otherwise competent to inquire into and try that offence.[49] A controversy exists as to whether the High Court can order transfer of a case from a court which does not have local jurisdiction under the abovesaid Sections 177 to 185.[50] It has been held in some cases that the High Court has no power under this section to order transfer of a case pending in a court which has no territorial jurisdiction under Section 177 to 185.[51] However in a case where the Magistrate thought that the offence was committed outside the limits of his territorial jurisdiction and the complainant had applied for transfer of the case, it was held that there was sufficient justification for the exercise of the powers under clause (i) of Section 407(1).[52]

Under clause *(ii)* the court to which the case is transferred, and the court from which the case is transferred must be subordinate to the High Court ordering the transfer.

There is no scope for doubt that Executive Magistrates are subordinate to the authority of the High Court. Therefore the High Court is competent to transfer a case from one Executive Magistrate to another Executive Magistrate both being subordinate to its authority.[53]

The court of the Judicial Magistrate of the First Class is not such a "court of equal or superior jurisdiction" to that of the Chief Judicial Magistrate. Therefore, in view of Section 407(i)(h), the High Court

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50. *See*, 41
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53. *Krishna*

cannot transfer a case from the court of the Chief Judicial Magistrate to that of the judicial Magistrate of the First Class.[54]

Under clause *{Hi)* the High Court can order any type of case to be committed for trial to a Court of Session and the clause is not limited in its scope only to cases triable by the Court of Session.[55] A proper punishment is always a part of the Scheme of justice. Without proper punishment justice can be frustrated; so in appropriate cases where proper punishment cannot be given by the court of Magistrate, it will be certainly expedient for the ends of justice that the case should be transferred and committed for trial to a Court of Session under Section 407(i)(m).[56] In this connection it may be pertinent to note that a special court presided over by an Additional Sessions Judge constituted under Section 12-A, Essential Commodities Act cannot get jurisdiction to try an offence under Section 406 IPC by a mere transfer of a case by the High Court.[57]

Under clause *{iv)* the High Court can transfer an appeal to itself and hear itd[s]

When the High Court orders under sub-section (1) of Section 407 *[i.e,* under clause *{iv)]* that a case be transferred from any court for trial before itself, it shall observe in such trial the same procedure which that court would have observed if the case had not been so transferred. [S. 407(8)]

(6} *Saving*.—Nothing in this section *[i.e.* S. 407] shall be deemed to affect any order of government under Section 197. [S. 407(9)]

According to Section 197(4), the Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such judge, Magistrate or public servant is to be conducted (in respect of any offence committed by such person in the discharge of official duty), and may specify the court before which the trial is to be held. Section 197(4) has already been discussed in para. 10.5(6).

The powers of High Court to transfer a case do not override the powers given to government under Section 197(4)- If a party feels aggrieved by the orders passed by government under Section 197(4), it can approach the Supreme Court for the transfer of the case under Section 406.

26.4 Transfer of cases and appeals by Sessions Judge

Power of Sessions Judge to transfer cases and appeals

In this connection Section 408 provides as follows:

408. (i) Whenever it is made to appear to a Sessions judge that an order under this sub-section is expedient for the ends of justice, he may order that any

Gandlury Pedda Veera Reddy v. *State of A.P.*, 1979 Cri Lj 1451 (AP).

Gundi Sahu v. *State of Orissa*, 1975 Cri Lj 1392 (Ori); W.E. *Bottingv. Emperor*, {1934S 35 LJ 92S, 930 (Oudh CC).

0 *Agha* v. *State*, 1979 Cri LJ 1097, 1098 (All).

~ *Prasad Gupta* v. *State of Rajasthan*, 1995 Supp (3) SCC 386: 1995 SCC (Cri) 924. *'rasad* v. *State*, T952 Cri LJ 1225: AIR 1952 Nag 289.

particular case be transferred from one Criminal Court to another criminal court in his sessions division.

(a) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested, or on his own initiative.

(3} The provisions of sub-sections (3), (4), (5), (6), (7} and {9) of Section 407 shall apply in relation to an application to the Sessions judge for an order under sub-section (1) as they apply in relation to an application to the High Court for an order under sub-section (1} of Section 407, except that sub-section {7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted.

As in case of the High Court, the Court of Session may exercise the powers of transfer suo motu *i.e.* on its own initiative, or on the report of the lower court or on the application of a party interested.

No guidelines are provided in Section 408(1) to indicate what are the grounds that are to be considered to hold that it would be expedient for the ends of justice to transfer a case from one criminal court to another criminal court in the same sessions division. It has been held in a catena of decisions of various High Courts that the powers vested in the Sessions Judge by Section 408(1} are very wide and these powers should be judicially and cautiously exercised.[59] It has been ruled that if in a counter case the Sessions judge formed strong opinion about the motive of the crime it may affect the decision and so the case should be transferred from his court.[60] It may also be noted that in view of the proviso to subsection (2) of Section 407 *[see supra,* para. 26.3(2)] the grounds mentioned in Section 407(1) will have to be read while understanding what grounds are to be regarded as expedient for the ends of justice to pass an order of transfer of criminal cases from one criminal court to another criminal court in very same division.[61] [62]

By sub-section (3) of Section 408 the provisions relating to procedure contained in sub-sections (3), (4), (5), (6), (7) and (9) have been made applicable *mutatis mutandis* to applications for transfer made to the Court of Session, with one alteration, that is, the maximum compensation award- able under sub-section (7) will not be [A] 1000 but only f 250 in cases falling under Section 400.

Section 407(5} requires an accused applicant to give a notice in writing of the application for transfer to the Public Prosecutor. In the absence of such notice the order of transfer would be considered illegal and is liable to be set aside.

It has been held that Section 408 relates to those cases which are originally filed in the court of either the Chief Judicial Magistrate or the

59. *Bharamammbika* v. *State of Mysore,*
60. *Zora Singh* v. *State of Haryana,* 1996
61. *Ibid.*
62. *State* v. *Rattan*

sub-divisional judicial Magistrate and not to those which are transferred to the Additional Sessions Judge or Assistant Sessions judge or Chief judicial Magistrate*[63]

A Sessions Judge is required to record reasons for making an order for transfer of a case under this section. [S. 41 z]

Withdrawal of cases and appeals by Sessions Judges

26.5

Withdrawal of cases and appeals by Sessions Judges

In this connection Section 409 provides as follows:

> 409. (1) A Sessions judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Magistrate subordinate to him.
>
> (2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.
>
> (3) Where a Sessions Judge withdraws or recalls a case or appeal under sub-section (1) or sub-section (2), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

The Sessions Judge is required to record reasons for making an order under this section also. [S. 412]

Once the trial has commenced in the transferee court there can be no withdrawal.[64]

Cases can be made over to Additional Sessions Judges or Assistant Sessions Judges under Section 194. *[see supra,* para. 10.4] Similarly certain appeals can be made over to an Additional Sessions Judge, or Assistant Sessions Judge or a Chief judicial Magistrate under Section 381(2). *[see supra,* para. 24.7] Such cases and appeals can be recalled or withdrawn by the Sessions Judge under this section, *[i.e.* S. 409] Section 409 does not relate to cases which are originally filed in the court of Chief Judicial Magistrate or sub-divisional judicial Magistrate.[65]

26.6

Withdrawal of cases by Judicial

Withdrawal of cases by Judicial Magistrates

Section 410 provides as follows:

> 410. (1) Any Chief judicial Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to

63. *State ofW.B.* v. *Gangadbar Dawu,* 1989 Cri Lj 563 (Cab-
64. *See,* discussions in *State ofW.B.* v. *Gangadbar Dawu,* 1989 Cri LJ
65. *See,* observations in *State* v. V.V. *Mahra,* 1988 Cri LJ 1488 (HP).

Under clause *(a)* of Section 411 a District Magistrate or Sub-Divisional Magistrate may make over for disposal any proceeding which has been started before him to any Magistrate subordinate to him but no such provision has been made under Section 410 authorising a Chief Judicial Magistrate to make over for disposal any case the trial of which has been started before him to any Magistrate subordinate to himself.[66] In a case the Calcutta High Court held that a Chief Judicial Magistrate can withdraw a case from the court of Additional Chief Judicial Magistrate.[67] If the legislature had intended to give such power to the Chief Judicial Magistrate also it would have expressed its intention in clear and definite terms.[68]

Section 192(2) referred to above relates to transfer of cases by Magistrates and has already been considered in *supra,* para. 10.3(c). Such cases can be recalled under sub-section (2) of Section 410 above.

The powers given by this section are very wide. But it is a well-known principle that wider the discretion the more careful should be its exercise.[69] [70]

The powers given to the Chief Judicial Magistrate under Section 410 are apparently for the purpose of facilitating the proper distribution of work among the Subordinate Magistrates. The function of the section is primarily of an administrative nature. If the transfer of the case seems to be necessary in order to get a fair and impartial trial or is expedient for the ends of justice, the party interested in such a transfer should move the High Court for Court of Session under Section 407 or Section 408 as the case may be. In such a case moving the Chief Judicial Magistrate under Section 410 does not seem to be appropriate. If the legislature had intended to give such powers to the Chief Judicial Magistrate, it could have done so as it did in the case of High Court and Sessions Court by enacting Sections 407 and 408. In the absence of any such provision the powers given under Section 410 should not be used for the purposes mentioned in Section 407 or Section 408. Therefore, allowing a party to move the Chief Judicial Magistrate for a purpose not covered by Section 410 and then pending the consideration of such an application, to stay the trial proceedings in the court of the Subordinate Magistrate does not seem to be quite legitimate and proper. A somewhat contrary view taken in T. *Velayudhan* v. *P. Aboobacker Haji*[70] by the Kerala High Court does not seem to be sound law.

A transfer under Section 410 unlike Section 192 could be at any stage. In fact there will be no question of fresh cognizance whenever there is a transfer. The maximum that could be paid is that If the case is at the trial

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stage, the transferee can start trial afresh from the beginning of that stage and nothing more.[71]

The Magistrate making an order under this section will have to record reasons for his order. [S. 4iz]

26.7 Making over or withdrawal of cases by Executive Magistrates

Making over or withdrawal of cases by 'Executive

Section 411 provides as follows:

411. Any District Magistrate or Sub-Divisional Magistrate may—

(a) make over, for disposal, any proceeding which has been started before him, to any Magistrate subordinate to him;

(b) withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and dispose of such proceeding himself or refer it for disposal to any other Magistrate.

If a case is transferred by a Sub-Divisional Magistrate, the District Magistrate may retransfer it in any manner he thinks fit.[72] Further in a case where the Sub-Divisional Magistrate has refused to transfer, the District Magistrate can transfer the case;[73] but then in such a case the SubDivisional Magistrate cannot nullify the transfer made by the District Magistrate by resorting to retransferring of the case.[74] A case of the SubDivisional Magistrate's Court cannot be transferred by a Sessions Court though it is a criminal court under Section 6 of the Code. Such a case can be transferred under Section 411 by the District Magistrates to whom the Sub-Divisional Magistrate is subordinate.[75]

The Executive Magistrate making any order under this section *[i.e.* S. 411] is required to record reasons for his order. [S. 412]

71. *Food Inspector* v. *K.P. Alavikutty*, 1987 Cri LJ 12.98 (Ker).
72. *Khemana* v. *Dularey*\ 1942 Cri LJ 478: AIR 1941 Oudh 388.
73. *Santhappa Sethuram* v. *Govindaswamy Kandiyar*, 18 Cri Lj 335: AIR 1918 Mad 1122; *Kishori Bala* v. *Bhagawa?idas*, 1956 Cri LJ
74. *Mohd. Akbar* v. *Emperor*, {1925) *26* Cri LJ 538, 539: AIR 1925 All
75. *State of Gujarat* v. *Ratilal Uttamcband Morabia*, 1992 Cri LJ 9

Chapter 27

Execution, Suspension, Remission and Commutation of Sentences

Object and scope of the chapter **27,1**

The chapter is divided into two main parts. Part I deals with execution of sentences, while Part II considers the circumstances in which the appropriate government can suspend, remit, or commute the sentence imposed on the offender.

The process of execution of the sentence will depend upon the nature and type of the sentence awarded by the judge or the Magistrate. In order to execute the sentences of death, imprisonment (including imprisonment for life, and rigorous or simple imprisonment), and fine, the Code has provided specific and separate rules for each such category of the sentence, and has also indicated common rules applicable in respect of all the three categories of the sentences. Part I, therefore, has been divided into four sub-divisions:

A) Death Sentences; [Ss. 413-26] B) Imprisonment;

[Ss. 417-20] C) Levy of Fine; [Ss. 421-24] and D) General Provisions Regarding Execution. [Ss. 425-31]

The suspension, remission and commutation of sentences mentioned in Part II may become necessary under diverse circumstances. These powers are undoubtedly the prerogatives of any sovereign power. But apart from that, the exercise of these powers in suitable cases may be useful to make the punishment subserve its real objectives and to make it more meaningful.

When the judge or the Magistrate is required to punish an offender, he may try to fix the most suitable punishment permissible within the limits provided by law. For this purpose he may consider all the circumstances relating to the crime and the criminal and may exercise all the care and skill at his command in choosing the right type of the sentence for the

offender. Yet, his decision may occasionally go wrong as there are all sorts of cases both predictable and unpredictable. The judgment of the legislature in providing any particular punishment or range of punishments in respect of any offence may in a rare case appear to be very inappropriate and rather too harsh. The judge or Magistrate in his turn might fail in some cases to predict accurately the future response of the offender to the punishment awarded. Thus the sentence fixed by the court may become in future inappropriately harsh and unreasonably less suitable to an offender who has reformed himself in an unpredictably shorter term of imprisonment. In such and similar cases, the powers conferred on the appropriate government to suspend, remit or commute the sentence imposed on the offender would be of immense use to correct the errors of judgment in the sentencing process and to accelerate and strengthen the process of resocialisation of the offenders. The provisions regarding suspension, remission and commutation of sentences are contained in Sections 432, to 435 and have been discussed in Part II of this chapter.

Part I
Execution of sentences A.
Death sentence

27.2 Execution of sentence of death

(a) Execution of order passed under Section 368.—When in a case submitted to the High Court for the confirmation of a sentence of death, the Court of Session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. [S. 413] As seen earlier in para. 23.8, a sentence of death awarded by a Court of Session is not final unless it is confirmed by the High Court; and for this purpose reference to the High Court is imperative. On such reference being made, the High Court, according to Section 368, may confirm the sentence of death or pass any other sentence warranted by law, or may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or may acquit the accused person.[1]

The above Section 413 requires the Court of Session to give effect to the order passed by the High Court on reference being made to it for confirmation of death sentence. In case the death sentence is confirmed, the Court of Session would issue a warrant in the prescribed form to the officer in charge of the jail for the proper execution of the sentence.[2]

1. *See supra*, para. .2.3.8.

2. Public hanging as a mode of execution of death sentence has been held to be unconstitutional in
Attorney General of India v. *Lacbma Devi*, 1989 Supp (1} SCO 264: 1989

FORM NO. 42

[See, Sections 413 and 414]

WARRANT OF EXECUTION OF A SENTENCE OF DEATH

To the Officer in charge of the jail at _

Whereas *{name of prisoner),* the (ist, znd, 3rd, *as the case may he)* prisoner in case No. _____ of the Calendar for zo_____at the Session held before me on the _____ day of_____, zo _____ , has been by a warrant of the Court, dated the_____ day of_____ , committed to your custody under sentence of death; _____ and whereas the order of the High Court at _____confirming the said sentence has been received by this Court;

This is to authorise and require you to carry the said sentence into execution by causing the said _____to be hanged by the neck until he be dead, at *{time and place of execution),* and to return this warrant to the Court with an endorsement certifying that the sentence has been executed.

Dated, this _____ day of _____, zo _____.

{Seal of the Court) *(Signature)*

When the sentence of death has been executed, the officer executing it shall return the warrant to the Court of Session, with an endorsement under his hand certifying the manner in which the sentence has been executed.[3]

{b) Execution of sentence of death passed by High Court.—When a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant. [S. 414]

The above Section 414 is applicable when the death sentence is passed not by a Court of Session but by the High Court itself, that is, either in appeal against acquittal or for enhancement of sentence or in revision proceedings.

Form 42 and the procedure mentioned earlier in sub-para *{a)* above may conveniently be used in relation to the execution of the death sentence under this section, *i.e.* Section 414. 27.3

Duty of the Jail Superintendent in certain cases Prior to the actual execution of any death sentence, the Jail Superintendent should ascertain personally whether the sentence of death imposed upon any of the co-accused of the prisoner who is due to be hanged, has been commuted. If it has been commuted, the Superintendent should apprise the superior authorities of the matter, who, in turn, must take prompt steps for bringing the matter to the notice of the court concerned.[4] 27.4

3. ***See infra.*** S. 430, para. 27.14.

4. ***Harbans Singh*** v. ***State of*** l/.P., (1982) 2 SCC icr: 1982 SCC (Crt) 361, 364:

Postponement of execution of sentence of death in case of appeal to Supreme Court

415. (1) Where a person is sentenced to death by the High Court and an appeal from its judgment lies to the Supreme Court under sub-clause *(a)* or subclause *(b)* of clause (1) of Article 134 of the Constitution, the High Court sliaii order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or, if an appeal is preferred within that period, until such appeal is disposed of.

(a) Where a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of a certificate under Article 13 a or under sub-clause (c) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court on such certificate has expired.

(3) Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition.

The object of this provision is to ensure that where there is a possibility of appealing to the Supreme Court, the appeal is not rendered infructuous by an unfortunately prompt execution of the sentence of death.[5]

{a) Appeals in cases of death sentences may come up before the Supreme Court—i) as of right under sub-clause *(a)* or sub-clause *(b)* of Article 134(1}; or *it)* on a certificate of fitness granted by the High Court under Article 132 or Article i34(i)(c); or *Hi)* after obtaining leave from the Supreme Court under Article 136 of the Constitution.[6] In the first case (z), which also covers cases of appeals to the Supreme Court under Section 379, it is clearly necessary that execution should be postponed until the period of limitation for preferring the appeal expires, or if an appeal is filed within that period, until the appeal is disposed of. In the second case (if), it is only if an application for a certificate is made to the High Court that there is a reasonable possibility of appeal. If such application is made, execution should be postponed until the application is disposed of. If the certificate is granted the possibility of appeal becomes almost a certainty, and the execution should be further postponed till the period of limitation for preferring an appeal expires. Within that period, the person sentenced should prefer an appeal and obtain a stay from the Supreme Court. In the third case *(Hi),* it is sufficient if execution is postponed for such period as would enable the person sentenced to apply for special leave to the Supreme Court. Within

5. *See*, the observations in the 41st Report,
6. *See supra*, para. 2,4.3 where
ah the circumstances in which

sentenced can apply for special leave and obtain from the Supreme Court orders for stay of execution.[7]

(b) Postponement of capital sentence on pregnant woman.—If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to imprisonment for life. [S. 416]

It is pertinent to note here that the Supreme Court did not consider having a suckling for the woman murder convict, a ground for commutation of death sentence into life imprisonment. The court did commute death sentence in this case on other grounds, however.[8]

B. Imprisonment

Place of imprisonment **27.5**

In this connection Section 417 provides as follows:

417. (1) Except when otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined. *Power to appoint place of imprisonment*

(z) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under sub-section {2), he shall, on being released therefrom, be sent back to the civil jail, unless either—

{a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been released from the civil jail under Section 58 of the Code of Civil Procedure, 1908 (5 of 1908}, or Section 2,3 of the Provincial Insolvency Act, 192.0 (5 of 192.0), as the case may be; or ***(b)*** the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be released under Section 58 of the Code of Civil Procedure, 1908 (5 of 1908), or under Section 23 of the Provincial Insolvency Act, 1920 (5 of 1920), as the case may be.

The above section is applicable only in such cases where no other law has provided for any place in which any person liable to be imprisoned or committed to custody could be confined. With the existence of the Prisons Act, 1894 and the Prisoners Act, 1900, the occasions to rely on Section 417(1) above would be rare. May be, it would help in a newly- acquired territory or a

7. *See*, 41st Report, p. 241, para. 28.2.

8. *Panchhi* v. *State ofU.P*(1998} 7 SCC 177: 1998 SCC {Crt) 1561.

27.6 Execution of sentences of imprisonment

Section 418 provides as follows:

Execution sentence

of 418. (1) Where the accused is sentenced to imprisonment for life or to *of* imprisonment for a term in cases other than those provided for by Section 413, the Court passing the sentence shall forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and, unless the accused is already confined in such jail or other place, shall forward him to such jail or other place, with the warrant:

Provided that where the accused is sentenced to imprisonment till the rising of the Court, it shall not be necessary to prepare or forward a warrant to a jail, and the accused may be confined in such place as the Court may direct.

(2) Where the accused is not present in Court when he is sentenced to such imprisonment as is mentioned in sub-section (1}, the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined, and in such case, the sentence shall commence on the date of his arrest.

Section 413, referred to in Section 418 (1), deals with the execution of the sentence of death as passed by the Court of Session and confirmed by the High Court.[9]

In respect of cases falling under sub-section (1) of Section 418, the sentence of imprisonment would commence from the time it is passed.[10] However, in cases where the accused is not present in court when he is sentenced to imprisonment, the court shall issue a warrant for his arrest for the purpose of forwarding him to jail or other place in which he is to be confined, and in such a case, according to sub-section (2) of Section 418, the sentence shall commence on the date of his arrest.

27.7 Warrant for execution of sentence of imprisonment

(1} *Direction to the concerned officer*.—Every warrant for the execution of

9. *See supra*, para.

10. *Bhanja Naik* v. *Somnath,* 1969 Cri LJ 1414, 1416: AIR 1969 Ori

C. Levy of Fine

Execution of the sentence of fine **27.8**

(i) *Warrant for levy of fine*.—In this connection Section 421 provides as follows:

421. (i) When an offender has been sentenced to pay a fine, the Court passing *Warrant for levy of* the sentence may take action for the recovery of the fine in either or both of*fine* the following ways, that is to say, it may—

{a} issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall Issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.

(2} The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1} are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under clause *(b)* of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

When a sentence of fine is imposed by the court, this section provides two methods by which the amount of fine can be recovered.

(/) One method of realising the amount of fine is to issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender. The expression "movable property" has not been defined in the Code, but according to Section *z{y*)—"words and expressions used herein *[i.e.* in the Codel and not defined but defined in the Indian Penal Code {45 of i860) have the meanings respectively assigned to them in that Code *[i.e.* Indian Penal Code]". According to Section 22, Penal Code, i860 (IPC), the words "movable property" are intended to include *corporeal property* of every description, except land and things attached to earth or permanently fastened to anything which is attached to the earth. It would, therefore, appear that only "corporeal property" may be attached and sold for realising the fine imposed by a criminal court. This would seem to exclude actionable claims, debts, salary not due, etc. from the court's process. It is primarily intended to

furnish the court with a rough and ready method of seizing and selling tangible goods belonging to the offender, when the fine to be realised is not a large sum.[12] In the proceedings for the recovery of fine under Section 421, the attachment of future salary of the offender is not permissible.[13] The warrant to levy a fine by attachment and sale is issued in the following form prescribed in the Second Schedule.

FORM NO. **43**

[See, Section **421**]

wARRANT TO LEVY A FINE BY ATTACHMENT AND SALE To *(name and designation of the police officer or other person or persons pyho is or are to execute the warrant).*

Whereas *(name and description of the offender)* was on the_____ day of _____ , 20 _____, convicted before me of the offence of *(mention the offence concisely},* and sentenced to pay a fine of rupees _____ ; and whereas the said *(name),* although required to pay the said fine, has nor paid the same or any part thereof;

This is to authorise, and require you to attach any movable property belonging to the said *(name),* which may be found within the district of _____ ; and, if within *(state the number of days or hours allowed)* next after such attachment the said sum shall not be paid (or forthwith), to sell the movable property attached, or so much thereof as shall be sufficient to satisfy the said fine, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Dated, this _____day of _____ , 20 _____ .

(Seal of the Court) *(Signature)*

(:ii) The second method, for recovery of the fine is by issuing a warrant to the Collector of the District, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter.

It has been ruled that a Chief judicial Magistrate does not have power to order sale of property of the defaulter under Section 421. Instead, he can issue a warrant to the District Collector to realise the amount as arrears of land revenue.[14]

The policy underlying the proviso to sub-section (1) of Section 421 appears to be that in general an offender ought not to be required both to pay the fine and to serve the sentence in default. But the proviso enables a warrant to be issued for recovery of the fine, even if the whole sentence in default has been served, if the court considers that there are

12. *See,* 4isc Report, p. 243
13. *Ali Khan* v. *Hajrambi,* 1981 Cri Lj 682, 683 (JCC
14. *Keshan Lai* v. *Kish an*

special reasons for issuing the warrant.[15] Secondly, when an order under Section 357[16] has been passed for payment of expenses or compensation out of the fine, a contumacious offender should not be allowed to deprive the aggrieved party of the small compensation awarded to it by the device of undergoing the sentence of imprisonment in default of payment of the fine. Therefore, the proviso also provides that in such cases the fact that the sentence of imprisonment in default of payment of fine has been fully undergone is no bar to the issue of a warrant for levy of the fine.[17]

The distinction between fine and compensation is clear. But both can be recovered as fine. The order of compensation can be effectuated by Section 431 which says that money can be recovered as if it is fine. And proviso to Section 431 says that Section *4x1* could be relied on for recovery.[18]

The special reasons to be given under the proviso to Section *4x1(1)* will depend on the circumstances of each case. If the court thinks that in spite of having undergone the default sentences the recovery of fine is also necessary, it should give special reasons.[19] [20] [21] The special reasons should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served, and any reasons which are directed to that point would be relevant. It may be that the authorities, though no negligence on their part, did not know of the existence of the property, or the accused may* have inherited property" after he served his sentence in default, or there may not have been time to execute the warrant. Matters of that sort would be all special reasons for issuing a warrant after the sentence in default has been served.[20] [21] The reasons which turn upon the nature of gravity of an offence cannot be characterised as special reasons envisaged by the proviso.[31]

Where a warrant for the recovery of the fine was issued before the whole term of imprisonment in default of payment of the fine was served, it is not necessary to record special reasons as the proviso is not applicable in such a case.[22] However, in dealing with such existing warrants the

15. *See,* observations in *Digam bar Kashinatb Bbavarthi* v. *Emperor.* (1935) 36 Cri l.J X034, 1035: AIR 1935 Bom 160. 161-62: see also. *K.*

16. For the. contents of S. 357, *see supra,* para. 23.13.

17. *See,* 41st Report, pp. 244-45, paxs- 2.8.10.

18. See, R. *Mohan* v. *A.K. Vijaya Kumar,* {2012) 8 SCO 721: (2012} 3 SCC (Cri) 30x3: 2012 Cri U 3953

19. *fagannaiha Naidu* v. *State of A. P.,* 1972

20. *See,* observations In *Digamhar Kashinatb Bbavarthi* v. *Emperor,* (1935} 36 Cri LJ 3034, 1035: AIR *ip55* Bom 160,

21. *Mari Singh* v. *State,* (1963) 1 Cri LJ 4So . 481: ./AIR 1963 Raj 80 ; *see also,* the observations in *Diqamhar*

22. *Nilkantha Pal* v. *Bisakha Pal,* 1936 Cri Lj 1267, 1268: AIR 1935 Cal 546.

court should follow the policy which seems to have inspired the proviso to Section 421(1).[23] [24] [25]

Sub-section (2) of Section 421 contemplates the making of rules by State Governments. Where such rules are not made and a claim is made by the third party to the property attached under Section 42i(i)([A]), the question may arise what procedure should be followed. One view is, that in such a case the only thing that can be done by the Magistrate is to stay the sale and refer the claimant to a civil court.[23] [24] [25] [26] [27] But according to another view, the procedure in Section 84[2:!] should be followed.[26] The rules should provide for the procedure to be followed when such claims are made.[27]

(i-A) *Time limit for levying fine.*—It may be pertinent to note here the time-limit prescribed by Section 70 IPC within which the fine is leviable. Section 70 IPC reads as follows:

> 70. *Fine leviable within six years, or during imprisonment. Death not to discharge property from liability.*—The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

(2) *Effect of such warrant.*—A warrant issued under clause *(a)* of subsection (t) of Section 421 by any court may be executed within the local jurisdiction of such court, and it shall authorise the attachment and sale of any such property outside such jurisdiction, when it is endorsed by the District Magistrate within whose local jurisdiction such property is found. [S. 422]

(3) *Warrant for levy of fine issued by a court in any territory to ivhich this Code does not extend.*—In this connection Section 423 provides as follows:

Warrant for levy of fine issued by a Court in any territory> to which this Code does not extend

> 423. Notwithstanding anything contained in this Code or in any other law for the time being in force, when an offender has been sentenced to pay a fine by a Criminal Court in any territory to which this Code does not extend and the Court passing the sentence issues a warrant to the Collector of a district in the territories to which this Code extends, authorising him to realise the amount as if it were an arrear of land revenue, such warrant shall be deemed to be a warrant issued under clause *(b)* of sub-section (1) of Section 421 by a Court in the territories to which this Code extends, and the provisions of

23. *Digambar Kashinath*
24. *Pandurang Venkatesh Malgi*,
25. For the contents of S. 84, *see*
26. *Marina Narasanna, re,*
27. *See*, 41st Report, p. 245, para.

sub-section (3) of the said section as to the execution of such warrant shall apply accordingly.

The territories to which this Code does not extend are mentioned in Section 1(2).[28] These are the States of Jammu and Kashmir, Nagaland and certain tribal areas.

27.9 Suspension of execution of the sentence of imprisonment in default of payment of fine

Suspension of execution of sentence of

Section 424 provides as follows:

424. (i) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

{a} order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days;

ib) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith: and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.

Section 424(1) applies if the court has imposed a sentence of fine only and has awarded a term of imprisonment in default of payment of fine; it does not apply where a substantive sentence of imprisonment has been awarded and also a fine and a term of imprisonment in default have been awarded by the court.[29]

In the event of default of payment of fine the court has no alternative but to take the applicants into custody and if money is deposited, the

28. *See supra,* para. 1.4 for the contents of S. 1(2,).
29. *Alt Hussain* v. *Emperor,* (1933} 34 Cri LJ 530, 532: AIR 1933 Cal 308-
30. *See,* discussions in *Ram Lakban* v. *State,* 1986 Cri Lj 617 (All).

D. General Provisions Regarding Execution

27.10 Who may issue warrant

Every warrant for the execution of a sentence may be issued either by the judge or Magistrate who passed the sentence or bv his successor-in-office. [S- 425]

27.11 Sentence on escaped convict when to take effect

Section 4Z6 provides as follows:

Sentence on escaped convict ivhen to take effect

426. (1) When a sentence of death, imprisonment for life or fine is passed under this Code on an escaped convict, such sentence shall, subject to the provisions hereinbefore contained, take effect immediately.

(z) When a sentence of imprisonment for a term is passed under this Code on an escaped convict,—

(a) if such sentence is severer in kind than the sentence which such convict

was undergoing when he escaped, the new sentence shah take effect immediately;

(b) if such sentence is not severer in kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

{3) For the purposes of sub-section (2), a sentence of rigorous imprisonment

shall be deemed to be severer in kind than a sentence of simple imprisonment.

The object of the section appears to be that the severer sentence must be 27.12 served first.

Sentence on offender already sentenced for another offence

Sentence on offender already sentenced for another offence

Section 427 provides as follows:

427. (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that where a person who has been sentenced to imprisonment by an order tinder Section 12.2 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

{%) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or

The general rule is that a sentence commences from the time it is passed. This section creates an exception in the case of persons already undergoing a sentence of imprisonment. It provides that a sentence which is first passed and which the accused is undergoing must be given effect to first and the sentence subsequently passed shall follow after the expiration of the first sentence. Sub-section (i), however, confers a discretion on the court to direct that the subsequent sentence shall run concurrently with the previous sentence.[31] The discretion to make the sentence on subsequent conviction run concurrently with the previous sentence must be based on some sound principle and is not meant to be exercised in an arbitrary manner. The exercise of the discretion should depend on the facts of each case, the nature or character of the offences committed, the prior criminal record of the offender, his age, and sex, etc.[32] It would be proper exercise of the discretion to make the sentence on a subsequent conviction to run concurrently with the previous sentence where separate trials are held for offences which, while constituting distinct offences, are inherently or intimately connected with each other.[33] The discretion can be exercised at the appellate or revisional stage also.[34]

The discretionary power given by Section 427 can be exercised on either the accused or the prosecution bringing to the notice of the court recording a subsequent conviction that the accused is already undergoing a sentence of imprisonment. However, once the judgment is pronounced recording a conviction and sentencing the accused to appropriate term of imprisonment, the court becomes *functus officio* and cannot *thereafter* resort to Section 427 and direct that the subsequent sentence shall run concurrently "with the previous sentence.[35] Such a direction after the passing of the judgment would amount to alteration of the judgment which is prohibited by Section 362.[36]

A different view has been taken by the High Court of Madhya Pradesh. According to that court, Section 427(1} confers an independent power on the court to direct a subsequent sentence awarded in a case to run concurrently with the sentence awarded in an earlier case, which can be exercised even after the disposal of the case on merits since it does not involve any review of the judgment on merits,[37]

31. .4.5. *Nsidu* v. *State of M.P.,* 1975 Cri Lj 498 *Mabadco* v. *E?npero?*\ (192.6*)* 2.7 Cri. l.j 807, sTT-II: AIR 1926 Nag 426; *Surja* v. *State,* AIR 1951 Raj 68; *Amar*
32. *Man:* v. *State of'Kerala..* 1983 Cri Lj 1262,1267 (Ker).
33. *Miiiaim Singh* v. *State,* 1974 Cri l.j 1597, :140c (All) (LB).
34. *Mam* v. *State of Kerala.:* 1983 Cri Lj' 1262, 1264 (Ker).
35. *Copal Dass* v. *State:* 1978 Cri l.j 962, 967 (Dei) (FB); *Bhaskaran* v. *State,* 1978 Cri Lj 738, 741 (Ker); *Mulaim Singh* v. *State,* 1974 Cri Lj 1397, 1399 (Ail)
36. *Ajie Si ngh* v. *State of Punjab,* 1982 Cri. Lj 22x5 (P&.H) (FB); *Kapoor Singh* v. *State of*
37. ,4.S. *Naidu v. State of* At.P.. 1975 Cri Lj 498- 500 (MP); see also. *Venkanna* v. *State of*

By the very nature of the powers of the appellate or revisions! court, it would be open to an accused person to contend in appeal or revision that the sentence awarded to him on subsequent conviction when he was already undergoing imprisonment may be ordered to run concurrently with the sentence that he was already undergoing. The higher court in the exercise of its appellate or revisional jurisdiction can pass such orders as are within the province of the trial court.[38] Even in a case where the accused has not sought relief in terms of Section 42.7(1) from the trial court, it would be open to him to seek such relief by invoking the revisional powers of the court on showing justifiable reasons for his omission.[39]

If the accused has not availed of the remedy of appeal or revision, he is precluded from invoking the inherent powers of the High Court In seeking redress under Section 427. However, the High Court may treat a petition filed for invoking its inherent jurisdiction under Section 482 as a revision filed under Section 397 and may grant necessary relief under Section 427 if so warranted by the exigencies of the facts of the case.[40] The Orissa High Court has, however, taken a more liberal view in favour of the prisoner. According to that court, the inherent power vested in the court is obviously intended for superintending the administration of criminal justice within the jurisdiction of the High Court with a view to ensuring that ultimate justice is done. If the superior court is not given this power there may be cases where the same accused would suffer convictions in different courts and where judgment would be delivered by two separate courts on the same day or near about, it may not be possible for the original court dealing with the case after there have been previous convictions to take note of the sentences awarded in the other cases and modulate its own sentence accordingly.[41] There is no clear restriction in the Code itself that a direction for making the sentences to run concurrently cannot be given in exercise of inherent powers, and it would be competent for the High Court to give such a direction in exercise of its inherent power under Section 482 where it would serve any of the three purposes mentioned in that section, *i.e.* to give effect to any order under the Code, or to prevent the abuse of the process of the court, or otherwise to secure the ends of justice.[42]

A.R, (1964) 2 Cri Lj 377, 378 (AP); *Basudeb Pradhan* v. *State*, 1983 Cri Lj 52.7 (Ori); V. *Venkateswarlu* v. *State of A.P.*, 1987 Cri Lj 1621 (AP); *Shersingh* v, *State of M.P.*, 1989 Cri LJS3Z(MP).

38. *Gopal Dass* v. *State*, 1978 Cri LJ 961, 963 (Dei) (FB).
39. *Ibid*, 967.
40. *Ibid*, 968. A/so *see*, observations in V. *Venkateswarlu* v. *State of A.P.*, 1987 Cri LJ 1621 (AP).
41. *Basudeb Pradhan* v. *State*, 1983 Cri Lj 527, 527-28 (Ori); see also, *Mulaim Singh* v. *State*, 1974 Cri LJ 1397,1401 (All) (FB); *Baijnath Kurmi* v. *State*, (1961} 1 Cri Lj 423, 42-25 (Pat);
0 *Venkanna* v. *State of A.P.*, (1964) 2 Cri LJ 377, 37$ (AP).
42. *Mulaim Singh* v. *State*, 1974 Cri LJ 1397, 1399 (All) (FB); *see*, observation in V. *Venkateswarlu* v. *State of A.P.*, 1987 Cri Lj 1621 (AP).

Where the second sentence passed on the accused was to commence on the expiration of the first sentence, and the first sentence was subsequently set aside, the second sentence would commence from the date of conviction, and the period of imprisonment already undergone in respect of the first sentence would be deemed to have been in respect of the second sentence.[43]

When two sentences are directed to run concurrently, they do not thereby merge into one sentence. It only means that they are to run together. A prisoner who is directed to undergo two sentences concurrently has to undergo both the sentences only once for the duration of that period of concurrence.[44]

It has been rightly held that imprisonment in default of payment of fine cannot be concurrent with a substantive sentence of imprisonment.[45]

The meaning of sub-section (a) of Section 427 is absolutely plain. The law lays down that under the circumstances in this matter the subsequent sentence has to run concurrently.[46] In the case of a murder convict who happened to commit another murder while undergoing life imprisonment, the Supreme Court ordered the sentence of life imprisonment in respect of second murder not to run concurrently. This direction was contrary to the provision in Section 427(2}. In fact what the court meant was that in case any remission or commutation in respect of the earlier sentence was granted to the prisoner the new sentence should commence thereafter.[47]

Period of detention undergone by the accused to be set-off against the sentence of imprisonment

27.13 Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him. [S. 428]

It has been observed "that in many cases accused persons are kept in prison for very long period as undertrial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as undertrial prisoner. Indeed there may be cases where such a person is acquitted ... in many cases the accused person is made to suffer

43. *Babibai* v. *Emperor*, {1945) 44 Cri LJ 130: AIR 1942 Bom 342.
44. *K. Venkata Reddy* v. *Inspector General of Prisons*, 1982 Cri LJ 1844
45. *Emperor* v. *Subrao Sesharao*,
46. *Karnataka State* v. M.S. *Bokkasad*, 1976 Cri LJ 808. 809 (Kant).
47. *Ranjit Singh* v. *UT of Chandigarh*, {1991} 4 SCC 304: 1991 SCC (Cri) 965.

jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided".[48] The present section is intended to mitigate this evil by setting off the period of detention as an undertrial prisoner against sentence of imprisonment imposed on him. It is intended to relieve the anguish of undertrials for their prolonged detention in jail during the investigation, inquiry or trial of a case.[49]

This section, on a plain natural construction of its language, posits for its application a fact situation which is described by the clause "where an accused person has, on conviction, been sentenced to imprisonment for a term". It does not refer to any particular point of time when the accused person should have been convicted and sentenced. It merely indicates a fact situation which must exist in order to attract the applicability of the section and this fact situation would be satisfied equally whether an accused person has been convicted and sentenced before or after the coming into force of the new Criminal Procedure Code, 1973 (CrPC).[50]

The procedure to invoke Section 428 could be miscellaneous application by the accused to the court at any time, while the sentence of imprisonment runs, for passing an appropriate order for reducing the term of imprisonment which is the mandate of the section.[51] The relief under Section 428 could be given by the High Court on a petition from jail in the exercise of its inherent powers in appropriate cases.[52] The judiciary has till 1985 been consistently holding the view that a person who is sentenced to imprisonment for life could not get the advantage of Section 428 as that section refers to "imprisonment for a term" and does not refer to "imprisonment for life".[53 54]

It has also been the view that if the sentence of imprisonment for life imposed on a person is later commuted to imprisonment for a fixed term by the order of the State Government under Section 433, even then the person would not be entitled to a set-off under Section 428 as the sentence of imprisonment for a term in that case is not one passed by a court on conviction as contemplated by Section 428C[4] The Supreme Court

48. joint Committee Report, p. xxix.
49. *Shab'ou* v. *State ofU.P.*, 1982. Cri Lj 1757, 1759 (AU) (FB).
50. *Boucher Pierre Andre* v. *Supt., Central Jail,* (1975} 1 SCC 192: 1975 SCC (Cri; 7°: 1975 Cri LJ 182.; *Narayanan Nambeesan* v. *State of Maharashtra,* (1974} 76 Bom LR 69°; *Biddika Jagannadham* v. *Supt., Central Jail,* {1974} 2
51. *Suraj Phan* v. *On? Prakash,* (1976) 1 SCC 886: 1976 SCC
52. *Suprovat Bose* v. *State,* 1976 Cri LJ 315 (Cal); *Abul Azad* v.
53. *Rajahusein* v. *State of Maharashtra,* 1976 Cri LJ 1294 (Bom); *Kariar Singh v. State of Haryana,* (1982) 3 SCC r. 1982 SCC (Cri) 522, 526;
1982 Cri LJ 1772; *M. Shanker Rao* v. *LG. of Prisons,* 1983
54. *R.A. Rehman* v. *State of Maharashtra,* 1978 Cri Lj 214, zr8 (Bom);

had expressed the view that the mischief sought to be remedied had no relevance where gravity of offence required the imposition of imprisonment for life*[55]

This approach has since undergone a change. In *Bhagiratb* v. *Delhi AdmnS*[6], the Supreme Court declared that graver the crime, longer the sentence and longer the sentence, greater the need for set-off and remission. Holding that the punishments are no longer retributory but rehabilitative, the Supreme Court extended the benefit of set-off to persons sentenced to life imprisonment. The Supreme Court overturned the ruling in *Kartar Singh* v. *State of Haryana*[57] [58] observing, "To say that a sentence of life imprisonment imposed upon an accused is a sentence for the term of his life does offence neither to grammar nor to the common understanding of the word, 'term' "[58]

The benefit of set-off is thus now extended to persons sentenced to life imprisonment as well.

Section 42.8 is absolute in its terms. It provides for set-off of the pre-conviction detention of an accused person against the term of imprisonment imposed on him on conviction, whatever be the term of imprisonment imposed and whatever be the factors taken into account by the court while imposing the term of imprisonment.[59] [60] [61] The application of the benefit of set-off to a lifer can arise only if an order is passed by the appropriate government under Section 432 or 433 CrPC.[60]

It is now enacted by adding a proviso to Section 428 (w.e.f. 23-6-2006), that the actual period of sentence undergone by the convict as an undertrial prisoner would be set-off from the imprisonment prescribed within Section

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The period of detention which Section 428 allows to be set-off against the term of imprisonment imposed on the accused on his conviction must be during the investigation, inquiry or trial in connection with the "same case" in which he has been convicted.[62] And "trial" in Section 428 includes appeal. So the detention during the

55. *Kartar Singh* v. *State of Haryana*, {1982) 3 SCC 1: 1982. SCC (Cri) 522, 52,9: 1982 Cn LJ 1772.
56. {1985) 2 SCC 58°: 1985 SCC (Cri) 28°: 1985 Cri LJ 1179.
57. *Kartar Singh* v. *State of Haryana*, (1982) 3 SCC 1: 1982 SCC (Cri) 522, 329: 1982 Cri LJ 1772.
58. *Bhagiratb* v. *Delhi Admn.*, (1985} 2 SCC 58°: 1985 SCC (Cri) 28°: 1985 Cri LJ 1179, 1181.
59. *Boucher Pierre Andrew Supt., Central Jail*, {1975) 1 SCC 192: 1975 SCC (Cri) 7°: 1975 Cri Lj 182.
60. *E.K. Chandra&enanw* S.P.. CB *CID*, 2°°1 Cri Lj 1281 (Ker).
61. *See*, Criminal Procedure Code (Amendment) Act, 2°°5.
62. *State of A.P.* v. *Anne Venkatesware*, (1977) 3 SCC 298, 3°3: 1977 SCC (Cri) 5°8, 5x3: 1977 Cri LJ 935; ICC. *Das* v. *State*, 1979 Cri LJ 362 (Dei); R.A. *Rehman* v. *State of*

set-off under Section 428.[63] The section has to be applied even handedly and uniformly in all cases and it is immaterial whether the accused is convicted in one case or many, whether simultaneously or at different times. It is also immaterial whether the sentences of imprisonment in the different cases are to run concurrently or consecutively. Further whether such pre-trial detention is common, in whole or in part, in the two or more cases is of no consequence to the application of Section 428.[64] If an accused is arrested and detained in two cases, the computation for the period of set-off must be done separately and he shall be entitled to claim set-off the period in both the cases.[65] The benefit will be available in each case to a convict who was convicted and sentenced for several offences.[66] [67] [68] A person who remained on bail cannot have the benefit of set-off of the period so spent.[67] [68]

To amplify the point a simple illustration as suggested by the Delhi High Court may be taken.[65] An accused is arrested in one case on 1 January 1977. He is arrested in another case on 1 January 1978 while the trial of the first case is proceeding. In the first case he is convicted and sentenced on 31 January 1978 to two years' imprisonment. Under Section 428 the accused will be entitled to set-off his period of detention from 1 January 1977 to 31 January 1978 against the term of imprisonment imposed on him in the first case. This legal position is incontestable. To take the illustration further, suppose in the second case the accused is convicted on 31 March 1978 and sentenced to three years' imprisonment. In such a case the accused would be entitled to set-off the pre-trial detention in the second case as well. In other words he can claim that the period of detention from 1 January 1977 to 31 March 1978 be set-off against the sentence of imprisonment imposed on him in the second case.

Further, where a person already detained in one case was also subsequently wanted in another case and he was not formally detained in that other case on account of the negligence of the concerned authorities, and for no fault of his, he can, with all justification, claim that his detention in the earlier case should also be deemed to be his detention for the purposes of the second case. In that event benefit of Section 428 can be extended to him.[69]

63. *State of M.P. v.*
64. *K.C. Das v. State,* 1979 Cri Lj 362., 364 (Del); see also,
65. *Lalrinfela* v. *State*
66. *Chinnasamy* v.
67. *foginder Singh* v.
68. *K.C. Das* v. *State,*
69. *Shabbu* v. *State of U.P.*, 1982 Cri LJ 1757, 1761 (All)

Where the accused is released on bail in one case and, thereafter, he is arrested in another case and remains in detention in the other case, he will not be entitled to set-off the period of detention during investigation, inquiry or trial of the subsequent case, so far as his period of detention in the first case is concerned*[70]

A question has often arisen as to whether the benefit of set-off is available to a person convicted and sentenced by a court martial. As early as 1984 the Madras High Court held that it would not be available.[71] However, the Calcutta High Court, in the context of a sentence awarded under the Border Security Force Act, ruled that this benefit can be made available since the said Act did not contain anything prohibiting its extension.[72]

The Supreme Court has put an end to this controversy by holding that the benefit of set-off would not be available to a person sentenced by a court martial.[73]

The period of set-off under Section 428 shall not be considered as a period of sentence served after conviction while computing the sentence for the purpose of granting remission.[74]

Saving **27.14**

Section 429 provides as follows:

> 429. (i) Nothing in Section 426 or Section 427 shall be held to excuse any *Saving* person from any part of the punishment to which he is liable upon his former or subsequent conviction.
>
> (2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment and the person undergoing the sentence is after its execution to undergo a further substantive sentence or further substantive sentences of imprisonment, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

Sections 426 and 427 referred to above have been discussed in paras. 27.10 and 27.11.

Return of warrant on execution of sentence **27.15**

When a sentence has been fully executed, the officer executing it shall return the warrant to the court from which it is issued, with an endorsement under his hand certifying the manner in which the sentence has been executed. [S. **43**°]

70. *Ghulam Mustafa* v. *State of Rajasthan*, 1995 Cri Lj 266 (Raj); *Raj Kumar* v. *State of Haryana*, 2005 Cri LJ 2527 (P&H).
71. *T.S. Ramani* v. *Supt. of Prison*, 1984 Cri Lj S92 (Mad).
72. *Anand Singh Bisht* v. *Union of India*, 1986 Cri Lj 563 (Cal).
73. *Ajmer Singh* v. *Union of India*, (1987) 3 SCC 340: 1987 SCC (Cri) 499: 1987 Cri Lj 1877; *Ajit Kumar* v. *Union of India*, 1987 Supp SCC 493: 1988 SCC (Cri) 101: 1988 Cri LJ 417: AIR 1988 SC 283.
74. *Saikee Mazar* v. *B.N. Patel*, 1989 Cri LJ 1257 (Bom).

When a prisoner who was to serve nine month's imprisonment was by mistake released after two months, the jailor got a warrant from the Chief judicial Magistrate for his re-arrest. The Allahabad High Court opined that the process was abused by giving wrong information under Section 430 without care and caution. The court, therefore, cancelled the warrant for his re-arrest.[75]

27.16 Money ordered to be paid recoverable as a fine

Section 431 provides as follows:

Money ordered to be ***paid*** *recoverable as a fine*

431. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:

Provided that Section 421 shall, in its application to an order under Section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of Section 421, after the words and figures "under Section 357", the words and figures "or an order for payment of costs under Section 359" had been inserted.

ff money is payable by an order passed under the Code, as for example, an order to pay maintenance-allowance under Section 125, it is, under this section, made recoverable as if it were a fine. However, if the method of recovery of such money is specifically provided elsewhere in the Code, then this section would not apply in such cases.

An order of compensation made under Section 357(3) can be effectuated by Section 431 which lays down that money can be recovered as if it is a fine. The proviso to Section 437 lays down that Section 421 could be acted upon for effecting recovery. The Supreme Court reasoned:[76]

> If Section 421 of the Code puts compensation ordered to be paid by the court on a par with fine so far as mode of recovery is concerned, then there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in case of default in payment of fine under Section 64IPC.[77]

FART II
Suspension. Remission and Commutation of Sentences

27X7 Constitutional provisions

The provisions contained in this part are ancillary to the powers conferred on the President of India and the Governors of States by Articles 72 and 161, respectively, of the Constitution. Both these articles first refer to

75. *Mobd. Harun* v. *State of U.P..,* 1951 Cri Lj X083
76. ***R.****Mohan* **v.** *A.K.. Vijaya Kumar,* (2012.) 8 SCC yzr: (2012} 3 SCC (Cri)
77. ***ibid.*** 729.

the power to grant pardons, reprieves, respites or remissions of punishment, and then to the power to suspend, remit or commute the sentence of any person convicted of any offence.[78]

In exercising this power the Governor or the President act and must act not on their own judgment but in accordance with the aid and advice of their Council of Ministers. The power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, must, in its exercise, anathematise arbitrariness and obey standards and guidelines intelligible and intelligent and integrated with the manifest purpose of the power.[79]

Remission granted in exercise of this power is not subject to any conditions.[80] It has been stated that the guidelines issued in pursuance of these articles have overriding effect.[81] The Andhra Pradesh High Court has also pointed out that the remission granted under the constitutional provisions might be extended to prisoners who, though convicted and sentenced by courts outside the State, are serving their terms in jails in the State.[82] However, a person who, despite conviction and sentence of imprisonment, was at large cannot be granted remission under Article x6i taking him to be person undergoing imprisonment. Obviously, there is no application of mind by the Governor.[83]

Suspension or remission of sentences 27.18

Section 432 provides as follows:

> 432. (1} When any person has been sentenced to punishment for an offence. *Power to suspend or* the appropriate Government may, at any time, without conditions or upon *remit sentences* any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
>
> {2} Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion, a certified copy of the record of the trial or of such record thereof as exists.
>
> {3) if any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the

78. *See*, 41st Report, p. 2,48, para. 29.1.
79. ***Merit Ram*** v. ***Union of India.,*** [1981} 1 SCC 107: 1981 SCC (Cri) 112, 148-49: 1980 Cri LJ 1440.
80. *Krishnan Nair* v. *State of Kerala*. 1984 Cri Lj 87 {Ker}; *State of* ***Haryana*** v. ***Bahaan,*** (2999) 7 SCC 355: 1959 SCC (Cri; 1193.
81. ***Chhinna Singh*** v. ***State*** *of Punjab,* 1997 Cri Lj 2876 (P&H).
82. ALT. ***Khan*** v. ***State of ASP.,*** 1997 Cri Lj 1962 (AP).
S3. See, ***Satpal*** v. ***State of 'Haryana..*** {2000} 5 SCC 170: 2000 SCC (Cri) 920: ***zooo*** Cri Lj 2297.

person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4} The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence {other than a sentence of fine) passed on a male person above the age of eighteen years, no such, petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and—

{a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(6) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means,—

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section {6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

{b} in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

Once a person is convicted and the sentence is imposed by the court, and such person is sent to jail as a prisoner, the execution of the sentence imposed upon him is to be done by the appropriate government in accordance with the rules framed in that regard.[84] As observed by the Supreme Court, two fundamental principles in sentencing jurisprudence have to be grasped in the context of the Indian Corpus Juris. The first is that sentencing is a judicial function and whatever may be done in the matter of executing that sentence in the shape of remitting, commuting or otherwise abbreviating, the executive cannot alter the sentence itself.[85] The remission or suspension under this section does not in any way interfere with the order of conviction passed by the court, but it only affects the execution of the sentence.[86] A remission of punishment does not mean acquittal

84. *S. Sant Singh* v. *State of Maharashtra, 2006* Cri

85. *Maru Ram v. Union of India,* {1981) 1 SCC 107: 1981 SCO (Cri) 112, 132: 1980 Cri Lj !440'

86. *Sarat Chandra Rabha* v. *Khagendranath,* AIR 1961 SC 334: (1961) *z SCR* 133; *Channugadu, re,* 1954 Cri Lj

and the convicted person has every right to go in appeal to clear himself of the stigma of conviction. [87] Though the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone; in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched.[88]

The section empowers the appropriate government to suspend or remit a punishment with or without any conditions attached to such suspension or remission.[89] In other words, the right to grant remission is vested with the appropriate government and not in any court.[90] Premature release of a person can be ordered by the appropriate government.[91] [92] Only an operative part of the sentence could be remitted. Obviously a period during which a person is on bail cannot be remitted.[93] In certain cases this power is exercised in consultation with the courts. The Supreme Court has ruled that Section 432 and Rule 131 of the Kerala Criminal Rules of Practice require reference to be made to the government through the High Court indicating the views of the Sessions Court on the propriety of reducing the sentence awarded to a person convicted of infanticide.[93] The power to grant remission is subject to the conditions enumerated in Section 432 CrPC and one such condition is that an accused person who is being granted remission of sentence will have to be in custody, when the decision to grant remission is made by the government concerned.[94] The government cannot release life convicts on parole while their appeals are pending in the appellate courts. They could perhaps be released on bail.[95] The power given to the government by this section is purely discretionary, and the law does not enjoin upon the government to give reasons for remitting the unexpired portion of the sentence in the order of remission.[96] However, the appropriate

AP 259-62,

87. *Puttawwa, re,* 1959 Cri LJ 617: AIR 1959 Mys 116.
88. *Marts Ram* v. *Union of India,* (1981} 1 SCC 107: 1981 SCC (Cri) 112, 132-33: 1980 Cri Lj 1440; see also, *Sarat Chandra Rabha* v. *Khagendranath,* AIR 1961 SC 334: (1961} 2 SCR i33*
89. *Venkatesh Yeshwant Deshpande* v. *Emperor,* AIR 1938 Nag 513.
90. *K. Randurangan* v. *S.S.R. Velusamy,* (2003} 8 SCC 625: 2004 SCC (Cn) 48: 2003 Cri Lj 4964.
91. See, *Laxman Naskar* v. *Union of India,* (2000} 2 SCC 595: 2000 SCC (Cri) 509: 2000 Cri Lj 147192. See, *State of Haryana* v. *Nauratta Singh,* (2000) 3 SCC 514: 2000 SCC (Cri) 711: 2000 Cri LJ 1710.
93. *K.E. Thankamaniw. State of Kerala,* 1998 SCC (Cri) 1357: AIR 1999 SC 1513.
94. *K. Randurangan* v. *S.S.R. Velusamy,* (2003) 8 SCC 625: 2004 SCC (Cri) 48: 2003 Cri Lj 4964.
95. *See,* observations in *Veeramchaneni Ragbavendra Rao* v. *State of A.P.,* 1985 Cri Lj 1009 (AP); *Kavuri Sudesthamma* v. *State of A.P.,*
96. Hukam Singh 0. State of Punjab, AIR 1975 P&H 148: 1975 Cri LJ 902, 909 (FB); *see also,* observations in *Saikee Mazar* v. *B.N. Patel,* 1989 Cri LJ 1257 (Bom). The observations in *Amritlal* v.

government must exercise this power fairly and not arbitrarily. It has been held that though the policy regarding premature release of convicts is evolved in exercise of executive powers and that it is within the realm of discretionary jurisdiction, such discretionary power is coupled with the legal duty to exercise the same once the conditions for its exercise are shown to exist.[1] In *Laxman Naskar* v. *State of* W.B.[2], the Supreme Court listed out the considerations which apparently should guide the authority in ordering premature release of an offender. The following are some of the questions which need to be considered in this context:

(i) whether the offence is an individual act of crime without affecting the society at large;

iii) whether there is any chance of future recurrence of committing the crime;

(Hi) whether the convict has lost potential for committing crime;

(iv) whether there Is any fruitful purpose of confining the convict any more; and

(z/) what is the socio-economic condition of the convict's family.

The exercise of this power is subject to judicial review.[3] Also, in certain cases the High Court recommends remission by the appropriate government.[4] Political vendetta or party favouritism cannot be Interlopers in this area.[5] The order which is the product of extraneous or *mala fide* factors will vitiate the exercise of the power.[6]

If the State decides to grant certain remission to prisoners of a particular caste or race and if the State denies the same to other prisoners on the basis of their caste and race only, the prisoners who are so denied the benefit are entitled to invoke the fundamental right under Article 15 of the Constitution. The power to grant remission is no doubt discretionary but it is subject to the constitutional rights of the prisoners and cannot be used so as to discriminate the prisoners on the basis of caste and race only. Fitness of a prisoner for remission or release cannot be judged on the basis of caste or race alone. The special remission granted to prisoners of the Schedule Castes and Scheduled Tribes thus bears no reasonable nexus with the advancement of the Scheduled Castes and Scheduled Tribes and does not qualify for protection under clause (4) of Article 15 of the Constitution.[7]

distinction between younger prisoners and prisoners who attained the age of 65 years.

1. *Bir Singh* v. *State of H.P.*, 1985 Cri LJ 1458 (HP).
2. (2000) 7 SCC 6z6*:* 2000 SCC (Cri) 1431.
3. *Baijit Singh v. State of Punjab*, 1986 Cri Lj 1037 (PScH).
4. *Balu* v. *State of Maharashtra*, 1993 Cri LJ 3 62.1 (Bom).
5. *See*, discussions in *Swaran Singh* v. *State ofU.P(1998}* 4 SCC 75: 1998 SCC {Cri} 804.
6. *Maru Ram* v. *Union of India*, (1981} 1 SCC 107: 1981 SCC (Cri) 112, 150: 1980 Cri Lj 1440; *Peoples' Union of Civil Liberties* v. *State ofU.P.*, 1983 Cri Lj 1x66 (All).
7. *Mohan Singh* v. *State ofM.P.*, 1981 Cri Lj 147, 150 (MP).

The Supreme Court on appeal approved this reasoning of the Madhya Pradesh High Court. However, it did not agree with the High Court in extending the benefit to other prisoners who do not belong to Scheduled Caste or Scheduled Tribe to avoid discrimination.^ S. * * 8

The government has no doubt the power to remit wholly or in part the sentence of fine but has no power to remit the imprisonment in default of payment of fine. Because while fine is a substantive sentence, the imprisonment in default of payment of fine is not punishment for the offence for which the offender has been convicted but is punishment for the failure to pay the fine.[9]

Under the law as it stands, a person sentenced to imprisonment for life is bound to serve the life term in prison unless the appropriate authority commutes or remits the sentence in the exercise of the powers given under Sections 43a and 433 of the Code.[10]

Even these powers have been restricted in certain cases after the enactment and insertion of Section 433-A which will be considered in detail later. As the sentence of imprisonment for life is a sentence of indefinite duration, the remissions earned according to the rules under the Prisons Act do not in practice help such a convict as it is not possible to predict the time of his death. Such remission probably may help the government in deciding to exercise its power to remit the remaining part of the sentence of life imprisonment.[11]

The exercise of the powers by the appropriate government under Sections 432 and 433 is not subject to control by the court. The court cannot issue any direction in the matter of granting remission or commutation of sentences. "It is not for the judiciary to enter into the arena."[12] The trend of the courts has been to favour premature release of prisoners after they have served the terms for sometime. However, it has been made very clear that a decision on premature release will have to be taken by the appropriate government rather than by the courts.[13] Indeed, where the judicial function ends by awarding conviction and imposing sentence, it is there that the executive function begins and it is then for the latter to

S. *State of M.P.* v. *Mohan Singh,* {1995) *6* SCC 32.1: 1995 SCO (Cri)

9. *Bkai Abdul Gani* v. *State of* M.P., AIR 1951 Nag 342: ILR 1951 Nag
State, 1969 Cri Lj 350, 353-54: AIR 1969 All 116.

10. *Copal Vinayak Godse* v. *State of Maharashtra,* AIR 1961 SC 600:
Samhha ji Krishan Ji v. *State of Maharashtra,* (1974) 1 SCC *196:*
1974 Cri Lj 302.

11. *Gopal Vinayak Godsew State of Maharashtra,* AIR 1961 SC 600:
(1961) 1 Cri Lj 736, 740; *Maru P am* v. *Union of India,* {1981} *1* SCC

12. *See,* observatio ns in UT *of Chandigarh* v. *Cbaranjit Kaur,* {1996) 7
SCC 492: T996 SCC (Cri) 484; *State of Punjab* v. *Kesar Singh,*
(1996) 5 SCC 495: 1996 SCC (Cri) 1034; V. *Shafeeque Ahmad* v.

13. *Balwinder Singh* v. *State of Punjab,* 1997 Cri Lj 2828; V. *Shafeeque*
Ahmad v. *State of Karnataka.* 1998
Cri Lj 4480 (Kant); *Chhinna Singh* v.

consider the question of suspensions, remission and commutation of sentences.[14] [15] Therefore, the court while passing the sentence of imprisonment for life cannot pass an order specifying a particular term of imprisonment which the accused must undergo before he is released from jail inspite of the fact that he is entitled statutorily to invoke the powers of remission under Section 432,(1) or the appropriate government could suo motu exercise its powers to commute the sentence. Such an order or direction of the court would amount to impinging on the constitutional provisions contained in Articles 72, and 161 of the Constitution.[13]

The implication of executive power came to be explored and explained by the Supreme Court in *Narayan Dutt* v. *State of Punjab*[14] [15] [16], wherein the court, after surveying the material including from other jurisdiction, declared:

> It is well settled that to decide on the innocence or otherwise of an accused person in a criminal trial is within the exclusive domain of a court of competent jurisdiction as this is essentially a judicial function. A Governor's power of granting pardon under Article 161 being an exercise of executive function, is independent of the court's power to pronounce on the innocence or guilt of the accused. The powers of a court of law in a criminal trial and subsequent appeal right up to this court and that of the President/Governor under Articles 72/161 operate in totally different arenas and the nature of these two powers are also totally different from each other.

According to the Supreme Court, petitions filed under Articles 72, and 161 of the Constitution or under Sections 432, and 433 must be disposed of expeditiously. A self imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice.[17] In this context the Supreme Court has observed:

> Several instances can be cited, to which the record of this Court will bear testimony, in which petitions are pending before the State Governments and the Government of India for an inexplicably long period. The latest instance is to be found in Criminal Writ Petition Nos. 345-348 of 1983, from which it would appear that petitions filed under Article 161 of the Constitution are

14. *Satisb Kumar Gupta* v. *State of*
15. *Madhau*
16. (2011) 4 SCC 353:
17. *Sher Singh* v. *State of Punjab*, (19S3) 2 SCC 344: 1983

> pending before the Governor of Jammu & Kashmir for anything between five to eight years. A pernicious impression seems to be growing that whatever the courts may decide, one can always turn to the executive for defeating the verdict of the court by resorting to delaying tactics. Undoubtedly, the executive has the power, in appropriate cases, to act under the aforesaid provisions but, if we may remind, all exercise of power is preconditioned by the duty to be fair and quick. Delay defeats justice.[18]

In regard to suspensions and remissions of sentences, prior consultation of the court is not made compulsory under Section 432(2) of the Code;[19] and even in a case where the opinion is sought and obtained by the State Government from the court, the said opinion is not binding on the government.[20 21 22 23 24 25 26 27] And it may also be noticed that it is very seldom, if ever, that the government seeks the opinion of the presiding judge of the court under Section 432(2).^ Cases can be visualised where the extraordinary executive power of clemency is exercised keeping in view the multiple reasons which may have no relevancy with the facts as emerged in the trial of a particular case in which the prisoner was convicted.[22 23]

The Supreme Court in *Sangeet* v. *State of Haryana*[17'] *(Sangeet)* has held that Section 432 has limited application to convict as it applies only when additional remission is to be granted over and above what is permitted by jail manual or statutory rules.

In *Mohinder Singh* v. *State of Punjab*[24 25], it has been held that grant of remission is subject to satisfaction of conditions in jail manual or statutory rules.

In *Gurvail Singh* v. *State of Punjab*[25], while confirming a 30 years' non-remittable minimum term of imprisonment, it was held that where a case just falls short of the rarest of rare category and hence does not deserve death sentence but at the same time life imprisonment, which by remissions normally works out to a term of 14 years, would also be disproportionate and inadequate; sentence of death can be commuted to imprisonment for a minimum specified term in excess of 14 years without any remission. In doing so it was following the decision of the Supreme Court in *Sahib Hussain* v. *State of Rajasthan*[26 27], wherein the court found contrary observations of two-judge Bench in *Sangeet*[27] to be unwarranted. It was held that the court

18. *Sher Singh* v. *State of Punjab'* (1985) 2 SCC 344: 1983 SCC (Cri) 461,
19. *Hukam Singh* v. *State of Punjab'* AIR 1975 P&H 148: 1975 Cri Lj 902,
20. *Jaswant Rai* v. *State*, 1967 Cri LJ 577, 580: AIR 1967 Punj 155.
21. *See'* 41st Report, p. 249, para. 29.4.
22. *Hukam Singh* v. *State of Punjab'* AIR 1975 P&H 148: 1975 Cri LJ 902,
23. (2013} 2 SCC 452: (2013) 2 SCC (Cri) 611: 2013 Cri LJ 425.
24. (2013} 3 SCC 294: (2013} 3 SCC (Cri) 137: 2013 Cri Lj 1559.
25. (2013) 10 SCC 631.
26. (2013) 9 SCC 778.
27. *Sangeet* v. *State of Haryana'* (2013) 2 SCC 452.

power of remission, having regard to the facts and circumstances of the case.

Sub-section {7} of Section 43a gives the meaning of the expression "appropriate government" for the purposes of Sections 432 and 433. It may be noted that subject to the limitations mentioned in Articles 73 and 162 of the Constitution, the executive power of the Union or the State, broadly speaking, is co-extensive and coterminous with its respective legislative power.[2] [*] [*] [28] Therefore, the Union Government has executive power over all matters in List I of the Seventh Schedule of the Constitution, *i. e.* Union List; and the State Government has executive power over all matters in List II, *i.e.* State List of the abovesaid Schedule. As regards the matters in List III, *i.e.* Concurrent List, the State Government will be having executive power and the Union Government shall not have executive power unless the Constitution itself or a law made by Parliament expressly provides to that effort.

A plain reading of Entry 1 of the Concurrent List would show that the ambit of "criminal law" was first enlarged by including in it the IPC, and, thereafter from such enlarged ambit all offences against laws with respect to any of the matters specified in List I or II were specifically excluded. The reason for such inclusion and exclusion seems to be that offences against laws with respect to any of the matters specified in List I or List II are given a place in Entry No. 93 of List I, and Entry No. 64 of List II in the Seventh Schedule. The IPC is a compilation of penal laws, providing for offences relating to a variety of matters which are referable to the various entries in the different Lists. Many of the offences in the IPC relate to matters which are specifically covered by the entries in the Union List. In respect of such offences, only the Central Government is competent to suspend or remit the sentence of a convict.[29]

It has been held by the Kerala High Court that in the case of prisoners convicted and sentenced in one State but transferred to another State, the remission rules made under the prison rules in the transferee State should be applied. The court has, however, added that this principle is not applicable to Section 432 which deals with the remission of term of sentence.[30]

The appropriate government within the meaning of Section 432 or Section 433 would be the government of the State in which the prisoner has been convicted and sentenced, and not the government of the State where the prisoner might have been subsequently transferred,[31] or where [2]

2S. G.V. *Ramanaiah v. Supt. of Central Jail*, (1974) 3 SCC 531: 1974 SCC (Cri) 6, 8: 1974

29. *Ibid*, *6*, 10 [SCC

30. *Narayanan*

31. *State of M.P.* v. 471: X97S Cri Lj 3 SCC 470: 1976

the offence was committed. The same principle is applicable to the remission granted under Article 161 of the Constitution also.[32] The benefit of remission can be extended to convicts under the Prevention of Corruption Act. 1947.[33]

Classification of prisoners for the purposes of granting remission has been upheld by the Patna High Court.[34] Also, extension of the benefit of remission on the basis of the nature of offences has been approved.[35 36 37]

Commutation of sentence

27.19

Power to commute

Section 433 provides as follows:

433. The appropriate Government may, without the consent of the person sentenced, commute—

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of i860);

(:b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

The comments and observations made earlier in para. 27.17 in connection with the exercise of the powers of suspension and remission of sentences would apply mutatis mutandis in case of Section 433 dealing with the exercise of the power of commutation of sentence by appropriate government. It may be noted that Sections 54, 55 and 55-A IPC confer similar powers on the government.

It is interesting to note here that the Supreme Court has declared that Section 32-A, Narcotic Drugs and Psychotropic Substances Act, 1985 takes away the court's power to suspend sentence and the appropriate government's power to remit under Sections 432 and 433d[6]

There have been instances where the Supreme Court had reduced the sentences to simple imprisonment, on mitigating circumstances, and

32. *Lakhvinder Singh* v. *State of Punjab,* 1998 Cri LJ 942 (P&H).
33. *Padma* v. *State ofT.N.,* 1998 Cri LJ 4335 (Mad); but see, *M.T. Khan* v. *State of A.P.,* 1997 Cri LJ 1962 (AP).
34. *Satish Kumar Gupta* v. *State of Bihar,* 1991 Cri LJ *726* (Pat); *State of Haryana* v. *Jai Singh,* (2003} 9 SCC 114: 2003 SCC (Cri) 1761: 2003
35. *Jagroop Miishra* v. *State ofM.P..* 1998 Cri LJ 2580 (MP); *Sanaboina Satyanarayana v. State of A.P..* (2003) 10 SCC 78: 2003 Cri LJ
36. *Maktool Singh* v. *State of Punjab,* (1999) 3 SCC 321: 1999 SCC (Cri) 417.
37. N. *Sukumaran Natr* v. *Food Inspector,* (1997) 9 SCC 101: 1997 SCC (Cri) 608: 1995 Cri LJ 3651; *Badri Prasad* v. *State of M.P.,* 1995 Supp (4} SCC 682: 1996 SCC (Cri)

"Lifers" convicted of capital offences to suffer actual imprisonment for at least **14** years

Restriction on powers *of remission commutation certain cases*

in *of* The Criminal Procedure Code (Amendment) Act, 1978 added a new Section 433-A which reads as follows:

433-A. Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, snch person shall not be released from prison unless he had served at least fourteen years of imprisonment.

The section obviously applies only to two categories of prisoners undergoing imprisonment for life:

a prisoner who has been sentenced to imprisonment for life for an offence punishable with death or imprisonment for life;

a prisoner who was sentenced to death by court but whose death sentence has been commuted to imprisonment for life under Section 433(a).

The common factor binding together these two categories of "lifers" is the seriousness of the offences of which they were convicted. The seriousness of the offences is indicated by the legislature by providing death as an alternative punishment for the offences. Therefore, "lifers" convicted of offences not punishable with death (as one of the alternative punishments) are not within the purview of the section. Secondly, if the punishment of death is commuted to any punishment other than one of imprisonment for life [and this is possible, at least theoretically, under Section 433(a)], then also the case is not within the purview of the section. The thrust of the section is that the "lifers" of the abovementioned two categories are not to be released by remission of their sentences unless they have undergone at least 14 years in jail.

The idea in enacting this section seems to be to put some restraint on the unbridled power of remitting the whole or any part of punishment as provided by Section 432. A liberal or promiscuous use of this power of remission may mean that many a murderer or other offender who could have been given death sentence by the court but has been actually awarded only life sentence may legally bolt away the very next morning, the very next year, after a decade or at any other time the appropriate government is in a mood to remit his sentence. The experience of the working of Section 432 in many States showed, it is said, that "lifers" falling within the two abovementioned categories routinely earned remissions under the extant rules resulting in their release in a matter of a few years.

Taking cognizance of such utter laxity in these two graver classes of cases, Parliament thought it prudent to enact Section 433-A.[38]

The constitutionality of Section 433-A has been upheld by the court.[39]

The section has been declared by the Supreme Court to be prospective in effect. Therefore, the mandatory minimum of 14 years' actual imprisonment will not operate against those whose cases were decided by the trial court before r8 December 1978 when Section 433-A came into force. Every person who has been convicted by the sentencing court before this date shall be entitled to the benefits accruing to him from the remission scheme or short-sentencing project as if Section 433-A did not exist. The same logic would apply in a case where the death sentence is commuted to imprisonment for life before the said date. When a person is acquitted by trial court before the said date and is convicted in appeal after that date, the appellate conviction must relate back to the date of the trial court's verdict and substitute it. In this view such person will also be entitled to the benefit of the remission system prevailing prior to Section 433-A.[40]

The Madhya Pradesh Government notification categorised prisoners convicted prior to the date of effect of Section 433-A, *i.e.* 18 December 1978 into two, *viz.* younger prisoners and prisoners who had attained the age of 65. Under the scheme while the former were entitled to be released on completion of 17 years including remission, the latter were to be released on their completing 14 years including remission. This distinction was challenged as violative of Article 14 of the Constitution. The Madhya Pradesh High Court rejected this argument and held that the distinction was valid.[41] Another distinction made by the Andhra Pradesh Government was also held valid.[42]

Section 433-A does not and cannot affect the pardon power under Articles 72 or 161 of the Constitution and therefore notwithstanding Section 433-A. The President and the Governor continue to exercise the power of commutation and remission under the said articles on the advice of their respective Council of Ministers. However, the President or the Governor, while exercising powers under the said articles, is not likely to overlook the object, spirit and philosophy of Section 433-A so as to create a conflict between the legislative intent and the executive power.[43]

38. *Maru Ram* v. *Union of India,* (1981) x SCC 107:
39. *Ashok Kumar* v. *Union of India,* (1991} 3 SCC 498: 1991 SCC (Cri) 845: 1991 Cri Lj
40. *Maru Ram* v. *Union of India,* (1981) 1 SCC 107: 1981 SCC (Cri) 112, 152-33: 1980 Cri Lj 1440; see also, *Y. Dass* v. *State*, 1990 Cri
41. *Amritlal* v. *State afM.P.*, 1985 Cri LJ 1096 (MP).
42. *Ramulu* v. *State of A.P.*, 1985 Cri LJ 1679 (AP).
43. *Maru Ram* v. *Union of India,* (1981) 1 SCC 107: 1981 SCC (Cri) 112, 132-33: 1980 Cri Lj j.440; *see also,*

In *Sangeet*[44], it has been observed that sentence of imprisonment for 2.0 to 25 years without remission as a via media between death sentence and life imprisonment is not necessary in view of term to which life imprisonment extends and procedural and substantive checks put on government's power of remission. It was further observed that the sentencing policy, which has become judge centric, needs a relook as both crime and criminal are important in sentencing process.

However, another Bench of the Supreme Court in *Sahib Hussain* v. *State of Rajasthan*[45] has opined that the observations made in *Sangeet* were not warranted. In this case a direction of the High Court while commuting death sentence to life that he shall not be released from prison unless he serves out at least 20 years of imprisonment (not to get any benefit of remission) w[T]as approved of by the Supreme Court.

Section 433-A does not obligate continuous 14 years in jail and so parole is permissible. The period spent in open jail, house detention, etc. or on parole is as much imprisonment for computation of 14 years under the section. The prison administration, according to the Supreme Court, should liberalise parole to prevent pent-up tension and sex perversion.[46] [47] [48]

The Uttar Pradesh Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14-year duration. Similar other statutes and rules are also to enjoy similar efficacy.[47] [48]

The Delhi High Court has ruled that the period spent on furlough would not be imprisonment for computation under Section 433-A.[4S] Furlough would not be taken as imprisonment. The Gujarat High Court has also opined that furlough would not be taken as imprisonment for applying the remission granted to prisoners under Article 161 as the notification made it applicable to those prisoners who served 10 years' "actual" imprisonment.[49]

It has also been held that Section 433-A would not be applicable to a juvenile offender confined in Borstal School in Andhra Pradesh.[50] However, it may be applicable to such an offender in Haryana and as such

44. *Sangeet*
45. (2013} 9 S CC
46. *Ma ru*
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48. *Cha ranj*
49. *Dee* (Cri) 655:

he may not be released prior to his serving 14 years' imprisonment.[51] The request for bail of a juvenile offender covered under Section 433~A on the ground that there was delay in dealing with his request for early release, was rejected by the Punjab and Haryana High Court.[52]

It may be noted that the Supreme Court clarified that Section 433~A would be applicable to convicts under the Army Act.[53]

On several grounds the constitutional validity of Section 43 3-A was challenged; however, the Supreme Court, while rejecting each and every ground, has held that the section is not ultra vires the constitutional provisions and its enactment is within the legislative competence of Parliament.[54]

Concurrent power of Central Government in case of death sentences 27.21

The powers, conferred by Section 432 and Section 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government. [S. 434]

State Government to act after consultation with Central Government in certain cases 27.22

In this connection Section 435 provides as follows:

435. (1) The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence—

{a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946}, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or *{b)* which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or *{c}* which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government.

State Government to act after consultation with Central Government in certain cases

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment

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53. *Union ofIndia* v. *Sadha Singh*, {1999) 8 SCC 375: 1999 SCC {Cri) 1442.

54. *Maru Ramv. Union of India*, (1981) 1 SCC 107: 1981 SCC (Cri) 112, 132-33: 1980 Cri Lj

> which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.

The types of cases mentioned In the above section are such in which the Central Government is vitally concerned though the offence is against a law relating to a matter to which the executive power of the State Government extends and as such the authority to suspend, remit, or commute the sentence is the State Government. If a State Government chooses to take a lax view of these offences and to exercise its powers of remission and commutation unduly liberally, it is bound to create difficulties of administration for the Central Government. Therefore, it was considered desirable that in respect of such cases the State Government should be required to exercise its powers of remission and commutation only in consultation with the Central Government.[55]

Prison labour

An interesting question whether prisoners are to be paid for their labour in the prison came to be examined by the Supreme Court in *Rama Murthy* v. *State of Karnataka*[56] and *State of Gujarat* v. *High Court of Gujarat*[57]. In the latter case the majority held that it is not only the legal right of a workman to have wages for the work, it is a social imperative and an ethical compulsion. The judges added that extracting somebody's work without giving him anything in return is only reminiscent of the period of slavery and the system of begar.

Justice Wadhwa, on the other hand, held prison labour to be part of punishment. He responded to the views of the majority thus:

> To conclude, while agreeing with the directions issued by Thomas, J., I am of the view that putting a prisoner to hard labour while he is undergoing sentence of rigorous imprisonment awarded to him by a court of competent jurisdiction cannot be equated with 'begar' or 'other similar forms of forced labour' and there is no violation of clause (i) of Article 23 of the Constitution. Clause (2} of Article 23 has no application in such a case. The Constitution, however, does not bar a State, by appropriate legislation, from granting wages (by whatever name called) to prisoners subject to hard labour under courts' orders, for their beneficial purpose or otherwise.

55. *See,* 41st
56. (1997) 2 SCC
57. (1998} 7 SCC

Chapter 28

Preventive and Precautionary Measures

Object and scope of the chapter **28.1**

The primary object of criminal procedure is to provide a machinery for the administration of substantive criminal law. The Code therefore enacted elaborate provisions, as seen in the preceding chapters, for the investigation, inquiry and trial in respect of every crime alleged to be committed. In addition, it was felt expedient and necessary to include in the Code certain pre-emptive measures for prevention of crime and certain other precautionary measures for the safety and protection of the society. These matters are contained in Sections 106 to IZ4 and Sections 129 to 153, and have been discussed in this chapter.

The chapter has been divided into six parts. Part I deals with preventive action of the police; [Ss. 149-53] Part II deals with security proceedings; [Ss. 106-24] Part III considers the provisions relating to dispersal of unlawful assemblies; [Ss. 129-32] Part IV discusses the provisions for removal of public nuisances; [Ss. 133-43] Part V deals with urgent cases of nuisance or apprehended danger; [S. 144] Part VI considers the precautionary measures in respect of disputes as to immovable property. [Ss. 145-48]

As will be seen later, the preventive actions of the police discussed in Part I [Ss. 149-53] are purely of executive nature; while preventive and precautionary measures contemplated by the other parts are quasi-judicial and quasi-executive in nature, and the police cannot take action on their own unless backed by the order of the Executive or the Judicial Magistrate concerned.

Part I deals with prevention of cognizable offences, [Ss. 149-51] prevention of injury to public property, [S. 152] and inspection of weights and measures. [S- 153]

Part II dealing with security proceedings is aimed at persons, who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of public tranquillity. This is an instance of preventive justice which the courts are intended to administer. For this purpose Magistrates are invested with large judicial discretionary powers to nip in the bud conduct subversive of the peace and public tranquillity.[1]

Part III deals with dispersal of unlawful assemblies and such other assemblies as are likely to cause a breach of the peace. Action under this part can be taken by any Executive Magistrate or by an officer in charge of a police station; in case it becomes necessary for making the action effective, physical force might be used with the assistance of the police or armed forces.

Part IV considers the provisions relating to removal of public nuisances. The circumstances creating public nuisances are not as dangerous as those mentioned in the earlier parts; however as they are reasonably fraught with potential dangers, the Magistrates are empowered to take suitable action for the removal of such nuisances.

Part V deals with urgent cases of public nuisance or apprehended danger disturbing public tranquillity. The action contemplated in this part is to be quick and prompt to meet the emergent danger.

Part VI deals with precautionary measures in respect of disputes as to immovable properties. Though such a dispute does not affect the public at large, still It is fraught with consequences dangerous to the parties to the dispute and therefore necessitating preventive action.

These matters are discussed in detail in the succeeding paragraphs.

PART I

Preventive Actions of the Police

28.2 Prevention of cognizable offences

Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.
[S. **149**]

It has been held that display of photos of criminals are evidently preventive action which the police could resort under the Code.[2]

Further, every police officer receiving information of a design to commit any cognizable offence is required to communicate such information

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to the police officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any offence. [S. 150]

A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented. [S. 151(1)]

No person arrested under the above Section 151(1) shall be detained in custody for a period exceeding 24 hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.[3] [S. 151(2)] The Supreme Court has held that if the requirements for the exercise of power under Section 151, Criminal Procedure Code, 1873 (CrPC) are not fulfilled and a person is arrested, the arresting authority may be exposed to proceedings under the law.[4]

It has been held in *Manikandan* v. *SI of Police,*[5] that a person arrested on a mere suspicion cannot be said to be a person against whom commission of a cognizable or non bailable offence is alleged or made out and so cannot, without more, be remanded to judicial custody and should be released on bail treating the case as a bailable offence.

When a person is arrested without a warrant under Section 151(1), all the provisions of the Code applicable to arrest without warrant, for example, production before Magistrate within 24 hours,[6] informing the arrested person of the grounds of arrest,[7] etc. would, as far as may be, apply to such an arrested person. The object of Section 151(2) above is that if after the arrest no proceedings are instituted against such arrested person either to demand a security bond from him or for launching proceedings against him as an accused person in connection with an offence, he should be discharged.[8]

Prevention of injury to public property

28.3

A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation. [S. 152]

3. *See*, observations in *Shyam Dattatray*
4. *Ahmed Noormohmed Bhatti* v. *State of Gujarat*, (2005) 3 SCC 647: 2005 SCC
5. 2008 Cri L] 1338 (Ker),
6. *See supra*, Ss. 56 and 57, para. 6.5(c), *(d)*.
7. *See supra*, S. 50, para. *6.5(a)*.
8. *See*, Joint Committee Report, p. xv.

28.4

Inspection of weights and measures

Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false. [S- I53(I)3

If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall give information of such seizure to a Magistrate having jurisdiction. [S. 153(2)]

Part II
Security Proceedings

28.5

Security for keeping the peace

Security proceedings for keeping the peace may be taken against a person under the following circumstances:

(a) On conviction of an offence likely to cause breach of the peace.—When a person is convicted by a Court of Session or court of a Magistrate of the First Class of any of the offences likely to cause a breach of the peace as specified in Section 106(2), such court may at the time of passing sentence on such person order him to execute a bond, with or without sureties for keeping the peace for such period, not exceeding three years, as such court thinks fit. [S. x06(i)j Section 106 has been already discussed in the chapter on "Judgment" in para. 23.12.

(b) In other cases—Section 107 provides as follows:

Security for keeping the peace in

107. (1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, [9](with or without sureties] for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

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In order to be effective, proceedings under the above section have to be taken urgently, and as they are immediately concerned with the maintenance of peace and order, the functions under the section have been assigned to Executive Magistrates.[10] This is an instance of preventive justice which the courts are intended to administer. This provision like the preceding one is in aid of orderly society and seeks to nip in the bud conduct subversive of the peace and public tranquillity.[11]

The underlying object of the section is preventive and not punitive. The section is designed to enable the Magistrate to take measures with a view to prevent commission of offences involving breach of peace or disturbance of public tranquillity. The object of the section is that it can be invoked in emergent situation when prompt action is necessitated to deal with threatened apprehension of breach of peace.[12] Wide powers have been conferred on the Executive Magistrates and as the matter affects the liberty of the subject who has not been found guilty of an offence, it is essential that the power should be exercised strictly in accordance with law.[13] [14] [15] [16]

The courts have been very vigilant in dealing with action of the executive in relation to these provisions. It is evident from decisions like the one in *Medha Patkar'v. State of M.P,*[14], wherein the Madhya Pradesh High Court awarded compensation to the accused as the government sent them to prison for failure of furnishing bond in a case wherein there was nothing on record to show that there was apprehension of breach of peace. The accused were squatting on record shouting slogans. In *Rajender Singh Pathania* v. *State (NCT of Delhi)*[15][16], the court found that the orders passed against the defendants under Sections 107 and 151 were justified. However, the Delhi High Court in *Keshar Kumar* v. *State*[16] found the arrest and detention of the petitioner invoking Section 107 in an essentially civil dispute illegal and ordered compensation to be paid to the petitioner.

The *sine qua non* for institution of proceedings under this section is that the Magistrate should be of the opinion that there is sufficient ground for proceeding against the person informed against.[17] And the Magistrate

10. *See,* 41st Report, p. 50. para. 8.7.
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14. 2008 Cri LJ 47 (MP).
15. (2011) 13 SCC 329: (2012} 1 SCC (Cri) 873: 2012 Cri LJ 609.
16. 2008 Cri LJ 233 (Del).
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is bound to record his opinion as contemplated by Section 107 and thereafter is to prepare the notice under Section m.[is]

As the Magistrate is responsible for maintaining peace in his division, he has absolute and unqualified discretion to decide whether or not it is imperative for the maintenance of peace to institute proceedings under this section.[IS * * *, 19] He has to take decision as to what provisions should be resorted to in the circumstances of the situation. The Supreme Court in a case quashed the directions of the High Court to pay compensation and to initiate disciplinary proceedings against the authorities, as there was no illegality.[20]

While forming the opinion that there is sufficient ground for proceeding under Section 107, the Executive Magistrate will be guided by the information received by him. However, it is not necessary that the information contemplated by the section must be gathered from legal evidence. It may be from any source public or private.[21] There is no limitation of the way and manner in which the Magistrate may become aware of the commission of a breach of peace. Such information may be about past conduct and wrongful acts. The information about the past conduct or wrongful acts of the past must not however be remote or isolated but must be relatable to the present apprehension in the sense that it must have some relevance to the apprehension of likelihood of breach of the peace or disturbance of public tranquillity. The approach of the Magistrate from case to case must be highly empirical and not esoteric. Considering the scope and spirit of the section, it is neither possible nor desirable to formulate a hard and fast rule as regards the nature and source of information on which the Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation.[22] It has, however, been held that the information referred to in Section 107 must be of a clear and definite kind directly affecting the person against whom proceedings are being taken and it should disclose tangible facts and details so that it may afford notice to such person of what he is to come prepared to meet.[23]

The words "in the manner hereinafter provided" appearing In Section 107(1) are essential words and the Magistrate cannot discover a manner of his own. The manner provided is clearly laid down under

IS. *Tavinder*

19. C.S. *Reddy*
20. See, *Ram*
21. *Babaji Saho*
22. C.S. *Reddy* 41 Cr i LJ 234, 344, 346: AI *Ajit*, 1978 Cri
23. *Red dy*

Section in. Therefore issue of preliminary notice to show cause, apart from what is provided in Section in, would not be justified.[24] Failure to comply with the requirements of Section m would vitiate the preliminary order and consequently the proceedings.[25]

When there is likelihood of breach of the peace with regard to dispute over land, the proper procedure is to draw proceedings under Section 145 and not under Section X07.[26]

It is clear from sub-section {2) of Section 107 that the Executive Magistrate will have jurisdiction to take proceedings under Section 107 when /) the place where the breach of the peace or disturbance is within his territorial jurisdiction, or *ii)* the person who is likely to commit a breach of the peace or disturb the public tranquillity is within his territorial jurisdiction.

The manner in which the Executive Magistrate would proceed for requiring a person to execute a bond for keeping the peace under Section 107 and the consequences of failure to execute such a bond when required by the Magistrate, would be discussed later in Sections in to 124.

No doubt, the proceedings under Section 107 are not barred by reason of Section 300 on the ground that a person has been previously convicted or acquitted of a particular set of facts constituting an offence for which he was previously tried; but the proceeding being judicial, on general principles of justice, it may not be expedient to launch for the same act one police investigation for prosecution in a regular criminal court to secure punishment and another proceeding for security in another court at one and the same time.[27] [28] Normally Section 107 proceedings should not be used as parallel proceedings. But there may be need for proceedings under Section 107 because of likelihood of imminent breach of peace or of disturbance of public tranquillity, and in such a case the basis for proceedings under Section 107 may also include the materials forming the basis of a criminal prosecution.

The emphasis of the proceedings under this section is the likelihood of imminent breach of peace. In a case where a person was asked to furnish security for good behaviour for two years, appealed to the Supreme Court which could dispose of it only after six years. Noting that there was no breach of peace the Supreme Court held that there was no need for insisting on security.[29]

24. *Amit Pal* v, *Anil*
25. *Mahadevaswamy* v. *State of Karnataka*, 19S9 Cri LJ 756 (Kant).
26. *Kadir Ali* v. *Wabab Alt*, 1980 Cri LJ 507, 509 (Gau). See also, *Kesbar Kumar* v. *State*, 2008 Cri LJ 233 (Del).
27. *A.B. Chandra Reddy* v. *Revenue Inspector*, 1980 Cri LJ 1169, 1170
28. *Moidu* v. *State of Kerala*, 1982 Cri LJ 2293, 2295, 2298 (Ker) (FB).
29. *Brij Copal Chaturvedi* v. *State of M.P.*, 1997 SCC (Cri) 569: 1995 Cri

28.6 Security for good behaviour

Sections 108, 109 and no provide for taking security for good behaviour from persons disseminating seditious matters or matters amounting to intimidation or defamation of a judge from suspected persons, and from habitual offenders. Having regard to the fact that the final order to be passed in these proceedings affects the liberty of the person against whom the proceedings are instituted and that sifting of evidence in a judicial manner is required before an order demanding security can justifiably be passed, it was considered desirable to vest the powers under these sections exclusively in Judicial Magistrates.[30] However, recently a change in this regard has been considered expedient and now these powers vest in the Executive Magistrates.[31] A corresponding change has also been brought about in Section 478 by the Amending Act, 1980. According to the new Section 478, if the Legislative Assembly of a State by a resolution $0 permits the State Government may, after consultation with the High Court, by notification, direct that references in Sections 108, 109, no, 145 and 147 to an Executive Magistrate shall be construed as references to a Judicial Magistrate of the First Class. The result is, it is now extremely difficult to give these powers to Judicial Magistrates. These changes, brought about by the Amending Act may prove detrimental to the liberty of the citizens. The attempt of the Andhra Pradesh Government to appoint DSP's and Dy. SP's as Executive Magistrates to deal with extremists groups was defeated by the Andhra Pradesh High Court by declaring it unconstitutional. The court ruled that Section 21 of the Code does not permit appointment of Executive Magistrates to deal with a class of people not mentioned in Sections 108 and no.[32]

Sections 107 to no deal with preventive action. They are vitally connected with the preservation of the public peace and the maintenance of law and order. This is the first duty of every State. The duty cannot be effectively carried out without some provisions designed to give sufficient powers. Some safeguards are needed no doubt; and the law provides for them.[33] Proceedings under Sections 108 to no are initiated either by the police or by private individuals and partake of some of the characteristics of a regular trial.[34]

{a) Proceedings against persons disseminating seditions matters.—Section 108 provides as follows:

Security for good behaviour from persons disseminating seditious matters

108. (i) When [35][an Executive Magistrate] receives information that there is within his local jurisdiction any person who, within or without such jurisdiction,—

(i) either orally or in writing or in any other manner, intentionally disseminates or attempts to disseminate or abets the dissemination of—

{a) any matter the publication of which is punishable under Section 124-A or Section 153-A or Sections 153-B or 295-A of the Indian Penal Code (45 of i860), or

(b) any matter concerning a Judge acting or purporting to act in the discharge of his official duties which amounts to criminal intimidation or defamation under the Indian Penal Code (45 of i860),

(«) makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation any obscene matter such as is referred to in Section 292 of the Indian Penal Code (45 of i860),

and the Magistrate is of the opinion that there is sufficient ground for proceeding, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

{2) No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 (25 of 1867), with reference to any matter contained in such publication except by the order or under the authority of the State Government or some officer empowered by the State Government in this behalf.

The jurisdiction under Section 108 is preventive and not punitive. The test under the section is whether the person proceeded against has been disseminating seditious matter or such other matter as is mentioned in Section 108, and whether there is any fear of a repetition of the offence. In each case that is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances.[36] [37] It may be noticed that while in respect of cases falling under clause (z) of Section 108 the dissemination must be intentional, but as regards cases under clause *{it)* of Section 108 the dissemination is not required to be intentional.

Security for good behaviour from

35. *Subs.* by CrPC (Amendment) Act, 1980 (63 of 1980), S. 2, w.e.f. 23-9-1980 for "a judicial Magistrate of the first class".
36. *Vaman Sakharam Khare* v. *Emperor,* (1909} 10 Cri Lj 379, 380: {1909) n Bom LR 745, /44-
37. *Subs,* for "a judicial Magistrate of the first class" by Act 63 of 1980,$. 2 (w.r.e.f

that there is reason to believe that he is doing so with a view to committing a cognizable offence, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

The object of his section is to check and control the persons who are likely to commit offences and it cannot be denied that this cannot be done unless they are prevented from doing so by resorting to provisions of this kind.[38]

The provisions of Section 109 are so stringent that it may be made an engine of oppression unless care is taken by Magistrates to prevent its abuse. The object of the section is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction.[39]

The words "conceal presence" in Section 109 are sufficiently wide to cover not only the concealment of bodily presence in a house or grove etc., but also the concealment of appearance by wearing a mask or covering the face, or disguising by wearing a uniform, etc.[40]

In order to attract the section two conditions will have to be satisfied: *i)* taking precautions to conceal presence; and *ii)* the concealment must be with a view to committing a cognizable offence.[41]

(c) *Proceedings against habitual offenders.*—Section no provides as follows:

no. When [42][an Executive Magistrate] receives information that there is within his local jurisdiction a person who—

Security for good behaviour from habitual

is by habit a robber, house-breaker, thief, or forger, or

is by habit a receiver of stolen property knowing the same to have been stolen, or

habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

habitually, commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of i860), or under Section 489-A, Section 489-B, Section 489-C or Section 489-D of that Code, or

habitually commits, or attempts to commit, or abets the

38. **Joint Committee Report, p. xi.**

39. ***Dasappa* v, *State of Karnataka,* 1975 Cri Lj 1613, 1614 (Kant).**

40. ***Abdui Ghafoorv. Emperor,* (1944) 45 Cri LJ 2,19, 220: AIR 1943 AH**

46 ***State of Mysore* v. *Koti Poo jury,* (1965} 2 Cri LJ 517: AIR 1965**
Mys 264, 266; *Satish Chandra Sarkar* v. *Emperor,* (1912) 13 Cri LJ *161,* 162: ILR (1912) 39 Cal 456; *Sheetal Baksh Singh* v. *R.,* (195°) 5[1] Cri d 609: AIR 1950 All 184; *Preo Nath Datta* v.

42. ***Subs,* for "a Judicial Magistrate of the first class" by Act 63 of 1980,**

(z) any offence under one or more of the following Acts, namely—

{a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973}[43] [44] [45] [46]

(c) the Employees' Provident Fund [43] [44][and Family Pension Fund] Act, 1952, {19 of 1952);

{d) the Prevention of Food Adulteration Act, 1954 (37 of 1954);

[e) the Essential Commodities Act, 1955 {10 of 1955); *if)* the Untouchability (Offences) Act, 1955 (22 of [1955]); [45] *(g)* the Customs Act, 1962 (52 of 1962);[45]

[46][* *

[4]*%h)* the Foreigners Act, 1946; or]

{it) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or *(g)* is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

Persons who habitually commit offences of anti-social nature such as those relating to adulteration of food or drugs or foreign exchange or customs or hoarding and profiteering or corruption deserve perhaps even greater control than persons who habitually commit offences like theft etc. These offences have, therefore, been included in the section.[47] [48] [49] The object of the section is to protect the public against hardened and habitual criminals.[48] [49]

The information received by the Magistrate under this section should not be vague and must indicate that the person against whom the information is given is by *habit* a robber, housebreaker, etc.[4'] The police report reproducing the words of the section and merely giving a bad name to a person does not really give information within the meaning of this section.[50]

The words "habit", "habitually" have been used in the sense of depravity of character as evidenced by the frequent repetition or commission of the offences mentioned in the section.[51] There is not the slightest doubt

43. Ed.: The Foreign
44. *Ins.* by the Repealing and Amending Act, 1974 (56 of 1974), S.
45. The word "or" *omitted* by Act 25 of 2005, S. 14(f) {w.e.f.
46. *Ins.* by Act 25 of 2005, S. 14(H) (w.e.f. 23-6-2006).
47. *See*, Joint Committee Report, p. xii.
48. *K.S. Rathinam Filial, re*, (1938) 39 Cri LJ
49. *Narendra Nath Jba, re*, (1938} 39 Cri LJ 811: AIR 1938 Pat 533.
50. *Nikka Ram* v. *State*, 1954 Cri LJ 49, 50: AIR 1954 Punj 6. See, *Harcharan* v. *State of U.F.*, 2008 Cri LJ 2972 (All).
51. *Bhubaneshwar Kuer* v. *Emperor*, (1927) 28 Cri LJ 359, 361:

that the expressions like "by habit";, "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of the counter-petitioner with laxity of semantics. The court must insist on specificity of facts and be satisfied that a consistent course of conduct convincing enough to draw the inference that by confirmed habit the counter-petitioner is sure to commit the offences mentioned if he is not proceeded against under Section nod[2]

The Supreme Court has directed the trial Magistrates to discharge their duties when trying cases under Section no with great responsibility, and whenever the counter-petitioner is a prisoner to give him the facility of being defended by a counsel. If the State is not in a position to render legal aid to such a person in custody, whether it be on account of financial stringency or otherwise, the entire proceeding may be vitiated by such failure on the part of the state to render legal aidd[3]

It may be noticed that unlike in Sections 108, 109 the bond to be executed under this section must be with sureties.

28.7 Preliminary procedure for initiating action under Sections **107** to **110**

(1) *Order requiring the respondent to show cause*.—When a Magistrate acting under Sections 107, 108, 109 or no, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.[52 53 54 55] [S. m]

Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquillity at his hands. Although Section in speaks of the "substance of the information" it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word "substance" means the essence of the most important parts of the information.[35] The purpose of incorporating in the order the substance of the information is to let the person proceeded against to know the charge against him so that he can answer it in his show cause. As such, once the notice served on him sets forth that substance, its absence in the order passed on the order sheet [52 53 54 55]

52. *Gopalanachari* v. *State of Kerala*, 1980 Supp SCC 649: 1981 SCC (Cri) 546, 550: 1981 Cri LJ 357. See also, *Jay want G. Tambe* v. *State of*

53. *Ibid*, 550; see also, *Subbayyan Achari* v. *State of Kerala*, 1981 Cri Lj

54. *See*, observations in *Tavinder Kumar* v. *State*, 1990 Cri LJ 40, 43

55. *Madbu Limaye* v. *Sub-Divisional Magistrate, Monghyr*, {1970) 3 SCC 746: 1971 Cri LJ 1720; see also, *Abdul Latifv. Amanat Alt*, 1974 Cri LJ 1092, 1095 (Gau); *Kutti Goundan, re*, (1925) 26 Cri LJ

is not very material.[56] The Magistrate cannot ask a person in respect of whom an order under Section in has been made to furnish security or bail for his appearance in court.[57] In a case where the show cause notice under Section in was issued in a cyclostyled form by filling in the blanks and conveying that it was being issued in consequence of a police report, it was held that the defect in notice was a curable irregularity only.[58] According to Allahabad High Court the provisions of Section in are mandatory and non-compliance with them cannot be treated as mere irregularity.[59]

(2) *Communication of the order*.—If the person in respect of whom such order *{i.e.* an order under S. 111} is made is present in court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him. [S. 112]

If the order is not read out and explained as required by Section 112 above it is an illegality which vitiates the proceedings.[60]

If such person is not present in court, the Magistrate shall issue a summons requiring him to appear, or when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the court. [S. 113] However, whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of peace, and that such breach of peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest, [proviso to S. 113]

The power of the Magistrate to issue warrant of arrest against a person in respect of whom an order under Section m has been passed is very limited. There is no provision in Section 113 or in any other section dealing with preventive action empowering the Magistrate to issue a warrant of arrest against a person if he fails to appear before him after the service of summons.[61] However if despite the service of notice the party does not appear in the court, then the provisions of Section 87 will be attracted and a warrant may be issued against such a party.[62]

Every summon or warrant issued under the abovementioned Section 113 shall be accompanied by a copy of the order made under Section in, and such copy shall be delivered by the officer serving or executing such

56. *Karlar Singh* v. *Sita Ram*, 1973 Cri
57. *Dhaneshwar* v. *State of Bihar*, 1973 Cri Lj 1055, 1058 (Pat).
58. *Jat Lai* v. *Cbander Pal*, 1973 Cri Lj 1515 (Del).
59. *Jahir Ahmed* v. *Ganga Prasad*, (1963) *1* Cri Lj 20,
60. *Malla Mohammedoo* v. *State*, 1966 Cri LJ 145: ./AIR 196(5 j&K 29.
61. *Dhaneshwar* v. *State of Bihar*, 1973 Cri Lj 1055, 1057 (Pat).
62. *Gopi* v. *State*, 1974 Cri Lj 1410, 1411 (Ail); for the text of S. 87, *see*

summons or warrant to the person served with, or arrested under, the same. [S. 114]

(3) *Personal attendance can be dispensed with.*—The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader. [S. 115]

28.8 Inquiry as to truth of information

In this connection Section *116* provides as follows:

Inquiry as to truth of information

116. (1) When an order under Section in has been read or explained under Section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under Section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

{2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons cases.

(3) After the commencement, and before the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section m has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:

Provided that—

(a) no person against whom proceedings are not being taken under Section 108, Section 109, or Section no shall be directed to execute a bond for maintaining good behaviour;

{b} the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section in.

{4) For the purposes of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

[6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry

period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs:

Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

{7) Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse.

The inquiry contemplated by the above section is a judicial inquiry and the court should reach its conclusions on the basis of the evidence recorded in the inquiry proceedings. Sub-section (2) provides that the inquiry should be made, as nearly as may be practicable, in the manner prescribed for conducting and recording evidence, in summons cases. The trial procedure for summons cases has been already discussed in Chapter 21 (see, paras. 21.2-21.n).

The words "take such further evidence as may appear necessary" in sub-section {1) mean that the Magistrate would take into consideration evidence relating to incidents and events which took place after the information was received.[63] The first sub-section read with sub-section {2} requires the Magistrate to proceed to inquire into the truth of the information. Sub-section (3} enables the Magistrate to ask for an interim bond pending the completion of the inquiry by him, *i.e.* after the commencement, and before the completion of the inquiry under sub-section (i). This is conditioned by the fact that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for public safety. This is applicable where the person is not in custody and his being at large without a bond may endanger public safety etc. The Magistrate has to justify his action by reasons to be recorded in writing.[64] If the person fails to execute a bond, with or without sureties, the Magistrate is empowered to detain him in custody. The section as it is drafted today is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if without any inquiry into the truth of the information sufficient to make out a prima facie case a person is to be put in jeopardy of detention. A

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63. *Matuki Mahton* v. *State,* (1963) 2 Cri LJ 312, 313: AIR 196:

64. *M a d h u*

are necessary. Therefore it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond.[65]

It may be noted that Section 88[66] may be available till the order under Section in is drawn up. After it is drawn up the Magistrate has to act under Section IIZ and Section 116(1). Then there is no room for Section 88.[67]

A person against whom allegations have been made in a proceeding under Chapter VIII of the Code is not an accused. Therefore power under Section 309(2) could not be called in aid for a direction that a delinquent produced in custody could be remanded to magisterial detention as contemplated in Section 309.[68]

The evidence regarding the general reputation of the respondent can be given to prove matters mentioned in sub-section (4). This is an extraordinary rule of evidence and the court will have to consider It very carefully.[69] The reputation evidence is made admissible out of necessity as it is extremely difficult under ordinary law to prove cases against habitual offenders and desperate and dangerous persons. Evidence regarding general reputation being weak type of evidence, should be scrutinised carefully and depended upon very cautiously.

Sub-section {5) makes it possible to have a joint inquiry in respect of persons who are confederates or associated together. The discretion given to the Magistrate for having a joint inquiry is to be exercised after taking into consideration how far the evidence concerns the association and how far the persons would be prejudiced by a joint inquiry.[70]

Sub-section (6) prescribes a time-limit for completing the proceedings. The object of the provisions relating to security proceedings is to prevent breach of the peace and unless the proceedings are completed within a reasonable time, recourse to drastic powers under these provisions would not be justified. Similar considerations would apply also to proceedings relating to bonds for good behaviour. The first part of sub-section (6) accordingly provides that if the enquiry under the section is not completed

65. *Madhu*
66. For
67.
68.
69.
70. *Shan Ganti Veera Reddi, re,*

within a period of six months from the date of the commencement thereof, such inquiry stands terminated on the expiry of that period. A special power, however, has been retained with the Magistrate to extend this period where there are special reasons to do so. It has been held that the period of six months ordinarily prescribed under sub-section (6) cannot be extended beyond another six months by the order of the Magistrate.[71] This provision would apply to all proceedings whether or not the person concerned is in detention. If no final orders are passed up to six months of the commencement of the inquiry or the extended period, then the proceedings will automatically come to an end.[72] Where a person is in detention, according to the proviso, the proceedings shall stand terminated on the expiry of a period of six months of detention.[73]

It is well established that if a statutory period of limitation is prescribed for the completion of the proceedings and a power is also given to the concerned court to extend that period, then that power can only be exercised in accordance with law within the statutory period. After the expiry of that period the court does not have any power to extend the limitation for the continuance of the inquiry.[74] [75]

In Section *n6(6),* the expression "shall on the expiry of the said period, stand terminated" clearly shows that in the event of the inquiry not being completed within the prescribed period, the proceedings came to an end automatically and no order of the Magistrate is, at all, called for. Indeed, the Magistrate becomes *functus officio* and he is divested of the seisin of the case. This conclusion is further fortified by Section 116(7) which empowers the Sessions judge to vacate a direction made by the Magistrate under Section 116(6} permitting the continuance of the proceedings, if he is satisfied that it was not based on any special reason or was perverse. Evidently, the legislature, in its wisdom has not only circumscribed the power of the Magistrate to extend the life of inquiry by special reasons to be recorded in writing but has also placed a curb on the exercise of such power by subjecting it to scrutiny by a higher court. No corresponding provision, however, has been made in Section 116 or elsewhere in the Code empowering the Sessions Judge to direct continuance of the proceedings in the event of its coming to an end automatically as provided by Section 116(6). By necessary implication, therefore, the power of a revisional court to direct continuance of the proceedings after it has come to an end is excluded/[5]

71. *Krishnadeo Singh* v. *State of Bihar*, 1985 Cri Lj 1763 (Pat).
72. *Subas Rai* v. *State*, 1979 Cri Lj 115 (Ail).
73. *See*, joint Committee Report, pp. xii-xiii.
74. *Subas Rai* v. *State*, 1979 Cri LJ 225, 226 (All); *Nasiru v. State of Haryana*, 1978 Cri Lj 603 (P&H); *Prafulla* v. *Ajit*, 1978 Cri LJ 316, 318 (Cal); *J.C. Mehta* v. *State*, 1982 Cri LJ 1488 (Del).
75. *J.C. Mehta* v. *State*, 1982 Cri Lj 1488, 1491 (Del).

The reference to the date of the commencement of the inquiry in Section *n6(6}* above, is with reference to the stage when the Magistrate, after both the parties appear before him, proceeds to inquire with reference to the evidence- Commencement of inquiry starts when the Magistrate attempts in a legal way to put the allegations to test for finding out whether they are the facts. Both sub-sections {3} and (6) of Section 116 refer to this stage as the commencement of inquiry.[76] When the inquiry under Section 116 *is* to be in the nature of trial in summons cases, *[see supra,* S. 116(2,)] it must be held that it commences as soon as the opposite party challenges the allegations made against him or refuses to admit the same or submits a show-cause petition against the allegation, or the Magistrate otherwise has reason to proceed or proceeds or decides to ascertain the truth of the allegation made against the opposite party by taking evidence or otherwise.[77] It may, however, be noted that some High Courts have taken a different view. According to these High Courts, the proceedings in the inquiry shall be deemed to commence on the date on which the person sought to be proceeded against appears or is brought before the Magistrate.[78]

Sub-section (7) provides a remedy to the person aggrieved by the decision of the Magistrate under sub-section (6) to continue the proceedings after the prescribed time-limit of six months.

28.9 Result of the inquiry as to the truth of information

(i) *Order to give security*.—Section 117 provides as follows:

Order to give security 117. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Provided that—

{a) no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under Section in;

(b) the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;

76. *Sana Khan* v. *State*,

77. *Baresh Chandra* v. *Ahitosh Panda*, 1978 Cri LJ 1171,1176 (Cal); see also, *Binapani Bora* v. *Narendra Nath Bora*, 1984 Cri LJ (NOC)

78. *J.C. Mehta* v. *State*

(c) when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

It has been provided by Section 354(6) that every order under Section 117 shall contain the point or points for determination, the decision thereon and the reasons for the decision. The provision regarding supply of copy of judgment to the accused shall, according to Section 363(3), apply in relation to an order under Section *iiy.*[79]

For the purpose of determining whether the sureties are fit or sufficient, the court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the court, as to such sufficiency or fitness.

[S. 441(4)]

The amount of the bond should ordinarily be such as may enable the party to get a surety, and should not be excessive.

In relation to clause *(c)* of the proviso, it will be pertinent to take note of Section 17, Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) (or similar provisions in the State Children Acts), That section provides:

> Notwithstanding anything to the contrary contained in the Criminal Procedure Code, 1973 (2 of 1974) no proceeding shall be instituted and no order shall be passed against a juvenile under Chapter VIII of the said Code.

Therefore clause (c) of the proviso to Section 117 will apply to only those cases of minors which are not within the purview of Section 17, Juvenile Justice (Care and Protection of Children) Act, 2000 (or similar provision in the State Children Act).[80]

(2) *Discharge of person informed against.*—Section 118 provides as follows:

> 118. If, on an inquiry under Section 116, it is not proved that it is necessary *Discharge of person* for keeping the peace or maintaining good behaviour, as the case may be, that *informed against* the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or if such person is not in custody, shall discharge him.

As there is no charge as such in the security proceedings, the term "discharged" should not be taken in its technical sense.

The court is not precluded from taking into consideration incidents and events subsequent to the passing of the preliminary orders under Section in.

If the material on record discloses that though there was a danger of breach of peace at one time, because of the happening of a

79. For the text of S. 363, *see supra*, para. 2.3.18.

80. See, *Riyazv. State of Maharashtra*, (2005) 36 AIC 657 (Bom).

subsequent event the danger of breach has disappeared, the court can drop the proceedings and discharge the person proceeded against. If the court finds that since the date of the incident complained of, a very long period has elapsed during the course of which nothing untoward has happened, the court may well draw the inference that the danger of breach of peace has vanished.[81 82]

28.10 Proceedings subsequent to the order under Section 117

(a) Commencement of period for which security is required.—If any person, in respect of whom an order requiring security is made under Section lO6 or Section 117, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence. [S. 119(1)]

In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date. [S. 119(2.)]

In a case where an appeal has been filed against the order passed under Section 117, the period for which the security is required commences from the date of dismissal of appeal.[82]

(b) Contents of bond.—The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond. [S. 120]

The forms prescribed in Second Schedule for bonds to keep the peace and for good behaviour are as follows:

FORM 12
[See, Sections 106 and 107]

BOND TO KEEP THE PEACE

Whereas I, *{name)* _____ , inhabitant of *{place)*_____ , have been called upon to enter into a bond to keep the peace for the term of_____ or until the completion of the inquiry in the matter of_____ now pending in the Court of _____ , I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term or until the completion of the said inquiry and, in case of my making default therein, I hereby bind myself to forfeit to

{Signature) [81 82]

81. *Ram Narain*
82. *Abdul*

FORM 13
[See, Sections 108, 109 and 110]

BOND FOR GOOD BEHAVIOUR

Whereas I, *{name)*_____ , inhabitant of *{place)*_____, have been called upon to enter into a bond to be of good behaviour to Government and all the citizens of India for the term of *(state the period)*_____ or until the completion of the inquiry in the matter of _____now pending in the Court of_____ , I hereby bind myself to be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of my making default therein, I hereby bind myself to forfeit to Government the sum of rupees_____ .

Dated, this_____ day of _____ , zo_____ .

(Signature)

(Where a bond with sureties is to be executed, add _____ }.

We do hereby declare ourselves sureties for the above-named _____ _____that he will be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Government the sum of rupees _____ .

Dated, this_____ day of _____ , 20_____ .

(Signature)

Power to reject sureties

(c) Power to reject sureties.—Section 121 provides as follows:

121. (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond:

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall, before holding the inquiry, give reasonable notice [83]

83. *Ramdhatii Mahto*

The sureties offered should not be refused except after judicial enquiry by the Magistrate under the provisions of Section m.[84] It is well settled that the question whether a particular person who is offered as a surety is or is not fit within the meaning of Section 121, must be decided by the Magistrate himself, and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial inquiry.[85] Rejection of a surety cannot be perfunctory and it is desirable that the order rejecting the surety should be passed within reasonable .. 86 time.

The question of the fitness of a surety will be determined by the Magistrate after inquiry. That the surety may not be able to have sufficient control over the accused, cannot be a valid ground in itself for rejection of surety.[87] The ability to exercise proper control over the accused person was however considered essential in some cases for the fitness of the surety.[88]

28.11 Imprisonment in default of security

In this connection Section 122 provides as follows:

122. {1 *)(a)* If any person ordered to give security under Section 106 or Section 117 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(b} If any person after having executed a bond [89][, with or] without sureties for keeping the peace in pursuance of an order of a Magistrate under Section 117, is proved, to the satisfaction of such Magistrate or his successor- in-office, to have committed breach of the bond, such Magistrate or successor-in-office may, after recording the grounds of such proof, order that the person be arrested and detained in prison until the expiry of the period of the bond and such order shall be without prejudice to any other punishment or forfeiture to which the said person may be liable in accordance with law.

Imprisonment in default of security

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing

Hiran v. ***Emperor,*** (1915} 16 Cri Lj 527: ILR (1914} 42 Cal 706.

85. ***Rayan Khan*** v. ***Emperor,*** (1915) 18 Cri LJ 408: ILR (1916) 43 Cal 1024,
See, 37th Report, p. 86, paras 311 & 312.
Jugal Singh v. ***Emperor,*** (1929) 30 Cri Lj 45: AIR 1928 Pat 374; ***Jesa Bhatha, re,*** {1920} 21 Cri LJ 377: AIR 1920 Bom 292.
Narain Sahai v. Emperor, {1946) 47 Cri Lj 757: AIR 1946 All 333 (FB); ***Abdul Karim v. Emperor,*** (1917} 18 Cri Lj 453: AIR 1917 Cal 209; ***Asiraddi Mandal*** v. ***Emperor,*** (1914) 15 Cri LJ 169: AIR 1914
Ins. by Act 25 of 2005, S. 15 (w.ei. 23-6-2006).

prison pending the orders of the Sessions judge and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, and after giving the concerned person a reasonable opportunity of being heard, may pass such order on the case as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

(4) If security has been required in the course of the same proceeding from two or more persons in respect of any one of whom the proceedings are referred to the Sessions judge under sub-section (2.), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for -which he may be imprisoned, shall not exceed the period for which he was ordered to give security.

(5) A Sessions judge may in his discretion transfer any proceedings laid before him under sub-section (2} or sub-section (4) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(6) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(7) Imprisonment for failure to give security for keeping the peace shall be simple.

(8) Imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under Section 108, be simple, and, where the proceedings have been taken under Section 109 or Section iro, be rigorous or simple, as the Court or Magistrate in each case directs.

According to Section 122(3) ^ Sessions judge is to form his independent opinion as to the propriety of the order, and has to deal with the case on merits.[90] [91] Section 122 is now very effective because it empowers the court to deal with the violator of the terms of the bond which could be with

Power to release persons imprisoned for failing to give security

2S.12

Power to release persons imprisoned for failing to give

In this connection Section 123 provides as follows:

123. (1} Whenever [92][the District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief judicial Magistrate in any other case] is of opinion that any person imprisoned for

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90. *Emperor* v. *Amir Bala*, {1911) 12 Cri Lj 257, 258: ILR (1911) 35 Bom 271, 274.

91. See, Criminal Procedure (Amendment) Act, 2005.

92. *Subs*, by Act 45 of 1978, S. 12 for "the Chief Judicial Magistrate".

security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the High Court or Court of Session, or, where the order was made by any other Court, the [93][District Magistrate, in the case of an order passed by an Executive Magistrate under Section 1x7, or the Chief Judicial Magistrate in any other case], may make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3} An order under sub-section fi) may direct the discharge of such person either without conditions or upon any conditions which such person accepts:

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) The State Government may prescribe the conditions upon which a conditional discharge may be made.

{5) If any condition upon which any person has been discharged is, in the opinion of the [4][District Magistrate, in the case of an order passed by an Executive Magistrate under Section 1x7, or the Chief judicial Magistrate in any other case] by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under subsection (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before the [93 95] [District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief judicial Magistrate in any other case].

(7) Unless such person gives security in accordance with the terms of the original order for the unexpired portion of the terms for which he was in the first instance committed or ordered to be detained {such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the [District Magistrate in the case of an order passed by an Executive Magistrate under Section 117, or the Chief judicial Magistrate in any other case] may remand such person to prison to undergo such unexpired portion.

(8) A person remanded to prison under sub-section (7) shall, subject to the provisions of Section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

(9) The High Court or Court of Session may at any ti^ne for sufficient

Magistrate under Section 117, or the Chief judicial Magistrate in any other case] **may** make such cancellation where such bond was executed under his order or under the order of any Court in his district.

(10) Any surety for the peaceable conduct or good behaviour of another person ordered to executive a bond under this Chapter may at any time apply to the Court making such order to cancel the bond and on such application being made, the Court shall issue a summons or warrant, as it thinks fit, requiring the person for w'hom such surety is bound to appear or to be brought before it.

This section gives power to the District Magistrate and the Chief judicial Magistrate to release persons jailed for failure to give security if he thinks that it can be done without hazard to the community. This power appears to be analogous to the power vested in the government to suspend, commute or remit sentences passed on persons convicted of offences.[95]

Security for unexpired period of the bond **28.13**

In this connection Section 124 provides as follows:

Security for unexpired period of bond

124. (1) When a person for whose appearance a summons or warrant has been issued under the proviso to sub-section (3) of Section 121 or under sub-section {10) of Section 123, appears or is brought before the Magistrate or Court, the Magistrate or Court shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security.

(2} Every such order shall, for the purposes of Sections 120 to 123 (both inclusive), be deemed to be an order made under Section 106 or Section 117, as the case may be.

When a Magistrate rejects a previously accepted surety under Section 121(3) or when a surety applies for his discharge under Section 123(10), then the present Section 124 provides procedure for dealing with such cases.

Appeal from orders requiring security or refusal to accept or **28.14** rejecting surety for keeping peace or good behaviour Any person:

(i) who has been ordered under Section 117 to give security for keeping the peace or for good behaviour, or *{it)* who is aggrieved by any order refusing to accept or rejecting a surety under Section 121, may appeal against such order to the Court of Session. [S. 373]

However, the above provision *[i.e.* S. 373] shall not apply to persons the proceedings against whom are laid before a Sessions Judge in accordance

98. *See,* 41st Report, p. 53, para. 8.16.

with the provisions of sub-section (z) or sub-section (4) of Section 122. [proviso to S. 373]

There are no specific provisions in the Code enabling the appellate court to stay the order passed under Section 117, in the event of admitting the appeal under Section 373. It has been held that in such a contingency the appellate court can stay the order under Section 386.[1]

Part III

Dispersal of Unlawful Assemblies

28.15 Dispersal of unlawful or potentially unlawful assemblies

(a) By use of civil force.—Section 129 provides as follows:

Dispersal of assembly by use of civil force

129. (1) Any Executive Magistrate or officer in charge of a police station or, in the absence of such officer in charge, any police officer, not below the rank of a sub-inspector, may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Primarily, the power is to disperse an "unlawful assembly". The power to disperse other assemblies likely to cause a disturbance of the peace etc. is only an extension of the first power. The extension is considered necessary, because such assemblies are *potentially* unlawful assemblies.[2] The "unlawful assembly" as such has been defined by Section 141, Penal Code, 1860 (IPC). It says:

141. *Unlawful assembly.*—An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

First.—To overawe by criminal force, or show of criminal force, [3][the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence; or

Fourth.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

For the purposes of dispersal of unlawful assemblies powers are conferred primarily on any Magistrate or officer in charge of a police station. Sometimes it may however happen that an officer in charge of a police station is not readily available at the place where there in an unlawful assembly, to order the dispersal of such assembly although there are other officers of police equal in rank to such officer in charge. The delay in getting in touch with such officer, might result in the situation becoming unmanageable.[4] The section therefore gives powers to other police officers (in the absence of the officer in charge of a police station) not below the rank of sub-inspector. Generally speaking, before any force can be used for the dispersal of the unlawful assembly as mentioned above, three prerequisites are to be satisfied. *Firstly*, there should be an unlawful assembly with the object of committing violence or an assembly of five or more persons likely to cause a disturbance of the public peace. *Secondly,* such assembly is ordered to be dispersed and thirdly, in spite of such order to disperse, such assembly does not disperse.[5] In a situation which did not justify firing, firing took place and that too not on the orders of the authorised officers; the dependants of victim were ordered to be compensated by the State.[6]

(b) By use of armed forces.—In this connection Section 130 provides as follows:

130. (1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces.

(2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as

Use of armed forces to disperse assembly

4. *See,* joint Committee Report, p. xiv.
5. *Karam Singh* v. *Hardayal Singh,* 1979 Cri Lj 1211, 1214 (P&H).
6. *State of Karnataka* v. *B. Padmanabba Beliya,* 1992 Cri LJ

arrest and confine In order to disperse the assembly or to have them punished according to law.

(3) Every such officer of the armed forces shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

(c) Power of certain armed forces officers to disperse assembly.—Section 131 provides as follows:

Power of certain armed force officers to disperse assembly

131. When the public security is manifestly endangered by any such assembly and no Executive Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such action.

When the public security is manifestly endangered and when no Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse the assembly with the help of the forces under his command.[7]

28.16

Protection against prosecution for acts done under Sections **129** to **131**

In this connection Section 13 a provides as follows:

Protection against prosecution for acts done under preceding sections

132. (1) No prosecution against any person for any act purporting to be done under Section 129, Section 130 or Section 131 shall be instituted in any Criminal Court except—

(a) with the sanction of the Central Government where such person is an officer or member of the armed forces;

(b) with the sanction of the State Government in any other case.

(z}(a) No Executive Magistrate or police officer acting under any of the said sections in good faith;

[b) no person doing any act in good faith in compliance with a requisition under Section 129 or Section 130.

{c) no officer of the armed forces acting under Section 131 in good faith;

[d] no member of the armed forces doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence.

{3) In this section and in the preceding sections of this Chapter,—

{a) the expression "armed forces" means the military, naval and air forces, operating as land forces and includes any other Armed Forces of the Union so operating;

7. See, 41st Report p. 54, para. 9.1

{b) "officer", in relation to the armed forces, means a person commissioned, gazetted or in pay as an officer of the armed forces and includes a junior commissioned officer, a warrant officer, a petty officer, a noncommissioned officer and a non-gazetted officer;

(c) "member", in relation to the armed forces, means a person in the armed forces other than an officer.

PART IV

Removal of Public Nuisance

Conditional order for removal of nuisance and consequential **28.17** steps

{a} Conditional order of Executive Magistrate.—**Section 133 provides as follows:**

133. (1) Whenever a District Magistrate or a Sub-Divisional Magistrate or *Cmditimal* *or der for removal of* any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

{a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

{1b} that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

{c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public

{») to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(Hi) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

{iv) to remove, repair or support such building, tent or structure, or to remove or support such trees, or

(v) to fence such tank, well or excavation; or

{vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(a) No order duly made by a Magistrate under this section shall be called in question in any civil court.

Explanation.—A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

The section is designed to afford a rough and ready procedure for removing public nuisances, and is intended to be used in urgent cases.[8] [9] The public nuisances no doubt are not as dangerous as the situations requiring the use of security proceedings, nor their removal is so urgent as the dispersal of unlawful assemblies; however they are yet fraught with potential danger requiring summary action for their removal.

It is pertinent to recall the observations of the Punjab and Haryana High Court with reference to the nature and consequences of orders made under 144 and 147. The court said:

> The proceedings are just to maintain peace and tranquillity and the orders rendered under these Sections are merely temporary orders. The orders of the courts are coterminus with the judgment or decree of the civil court. No sooner the civil court declares the right of the parties the temporary orders rendered lay the courts under Sections 133, 145 and 147 of the Code come to an end.[8] [9]

On the receipt of a police report or other information, the appropriate Executive Magistrate can exercise powers under this section in the six circumstances enumerated in sub-section (1).

Section 133 deals with certain specific public nuisances and provides a summary remedy for their removal. In some cases the view taken is that the section has been formulated to deal with *emergent* evils which are either existent or imminent.[10] (The section does not justify an action

8. *See*, 37th Report, p. 91, para.

9. *Bhaba Kama* v. *Ramchandra*,

10. *Ramesbwar Prasad* v. *State of Bihar*, (1958) 59 Cri LJ

being taken in regard to anticipated obstruction or nuisance}.[11] There must be imminent danger to property and consequential nuisance to the public.[12] It is, however, equally true that no period is prescribed within winch the court could be moved under this section for the removal of an evil in existence,[13] and each case will have to be regulated by its own circumstances.

In order to invoke Section the nuisance has got to be public nuisance and then only it can be stated to affect the members of public and hence can be removed from the public place. The phrase "public nuisance" has been defined in Section 2,68 IPC and this definition can very well be imported for the purposes of Section 133. According to that definition, in order to constitute a public nuisance, the injury, danger or annoyance must be caused to the public, or to the people in the vicinity, or to persons who may have occasion to exercise any public right.[14]

The object and purpose behind Section 133 is to prevent public nuisance, that if the Magistrate fails to take immediate recourse to Section 133, irreparable damage would be done to the public. However, under Section 133, no action seems possible if the nuisance has been in existence for a long period.[15] In that case the only remedy open to the aggrieved party is to move the civil court.[16]

According to Section 12 IPC, the word "public" includes any class of the public or community; but that class must be numerically sufficient to be designated "the public". The word community cannot be taken to mean the residents of a particular house. Community means something wider than that. Therefore if a particular individual or his family is only affected by the nuisance, such nuisance cannot be considered to be a public nuisance and hence its removal from any public place cannot be ordered under Section

17

[1]**33**-

The expression "public place" occurring in Section 133(1 *)(a)* has not been defined in the Code or in the IPC, though the explanation to Section 133 mentions that a "public place" includes also property belonging to the

v. *Jogesbwar Rain*, 1973 Cri LJ 1375, 1377 (HP); *Asharfi Lai* v. *State*, (1965) 1 Cri Lj 535*. AIR 1965 All 215; *T.K.S.M. Kalyanasundaram* v, *Kalyani Ammal*, 1975 Cri Lj 1717, 1718

11. *Sohan Lai* v. *Mohan Lai*, 1976 Cri Lj 1354, t355 (HP).
12. *Kachrulal Bhagirath Agrawal* v. *State of Maharashtra*, (2005) 9 SCC 3 6*:* 2005 SCC (Cri) 119T.
13. *Chhitar* v. *Chhoga*, 1974 Cri Lj 1230, 1233 (Raj); *Satya Sunder Ghose* v. *Sailandra Kinkar Pal*, {1954) 55 Cri Lj 1712: AIR 1954 Cal 560; *Raj Kumar* v. *State*, (1962) 2 Cri Lj 413, 414 (All); *State of* M.P. v. *Manji Raghu*, {1964) 2 Cri LJ 94, 96 (MP); *Asharfi*
14. *Hiralal* v. *Jogeshwar Ram*, 1973 Cri Lj 1375, 1377 (HP).
15. See, *Makhan Lai* v. *Buta Singh*, 2003 Cri LJ 4147 (P&H).
16. See, *Vasant Manga Nikumba* v. *Baburao Bhikanna Naidu*, 1995 Supp (4) SCC 54: 1996 SCC (Cri) 27.
17. *Ibid;* see *3.\so, jatindra Nath* v. *Manindra Nath*, (1950) 51 Cri Lj 1241: AIR 1950 Cal 530; *Dwarika Prasad* v. *B.K. Roy Cboudhury*,

State camping grounds and grounds left unoccupied for sanitary or recreative purposes. It has been held that a place in order to be public must be open to the public *i.e.* a place to which the public have access by right, permission, usage or otherwise.[1S]

It should be clearly understood that Section 133 is not be used as a substitute for litigation in the civil courts in order to secure the settlement of a private dispute. Action under Section can only be taken where there has been an invasion of public rights.[18 19] The first test which should be applied is that if the Magistrate does not take any action and direct the public to take recourse to the ordinary course of law, irreparable damage would be done and secondly, obstruction or nuisance should be an invasion on public right and not on individual.[20 21]

It was asserted by the Allahabad High Court that air pollution could be ordered to be prevented not only under the provisions of the Air (Prevention and Control of Pollution) Act, 1981 but also under Section 133 of the Code. In *Ramesh Chandra* v. *U.P. Pollution Control Board*[11], the court stressed that a Magistrate acting under Section 133 could prevent an industry from polluting air by passing an order and making it absolute under Section 13d or Section 138 of the Code.

Although Section 133 reads discretionary, it is categoric and has a mandatory import. It permits enforcement of civic rights under the municipal law where neglect has led to a public nuisance. Therefore when a Magistrate has before him information and evidence, which disclose the existence of a public nuisance and, on materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act under Section 133 and order removal of such nuisance within a time to be fixed in the order.[22 23] For exercising the powers under Section 133 it is necessary that the Magistrate draws up a preliminary order. It has been held by the Supreme Court in *Avarachan* v. *Srinivasan*[23] that the omission of the SDM to draw up a preliminary order, which is a *sine qua non* for initiating proceedings under Section 133 and without following procedure provided for under Section 138 the order of SDM to permanently close down a quarry was not valid. [18 19 20 21 22 23]

18. *Ram Kisbo re* v.
19. *State ofMys ore* v.
20. *Vijaya Bank*
21. 2000 Cri LJ
22. *Executive*
23. C.A.

Failure to comply with the direction will be punishable under Section 188 IPC.[24]

It has been ruled by the Madhya Pradesh High Court that Section 133 cannot be invoked to remove the public nuisance of water pollution caused by industrial waste discharged by an industry inasmuch as there are other laws such as Water (Prevention and Control of Pollution) Act, 1974 to deal with it,[25]

The Supreme Court dwelt with the question of application of pollution laws vis-a-vis criminal procedure law. The court explained that the areas of operation of the Code and the pollution laws are different with wholly different aims and objects and though they alleviate nuisance that is not of identical nature. There is no impediment for their existence side by side.[26 27 28]

Clause *(b)* of Section 133(1) is applicable only in such cases where the conduct of any trade or occupation etc. is injurious to the health or physical comfort of the community. Where the trade of auctioning vegetables was carried on in a private house, and the noise caused by auctioning disturbed the comfort of the persons living in the locality, an order restraining such trade under Section 133 was held to be not justified by the Supreme Court. According to the Supreme Court the conduct of a trade in vegetables was not that injurious to the health or physical comfort of the community so as to attract preventive action under Section 133.[27 28]

The Supreme Court has held that any noise which has the effect of materially interfering with ordinary comforts of life, judged by the standards of a reasonable man is nuisance and is actionable under Section 133.[2S]

It has been held that the working of a glucose saline manufacturing unit in a residential area was a nuisance causing disturbance to the people. The M.P. High Court reinstated the SDM's order asking the firm to remove the unit from there.[29 30 31]

An order passed by the Magistrate under Section 133 on the complaint that there was noise pollution, to close down a gas and electric welding workshop was sustained by the Rajasthan High Court though the owner was running it with permission from *1964*.[30 31]

In a case[21] where the Magistrate issued an order under Section 133(1} *(b)(ii)* to prohibit working of a tea factory on the allegation that it was

24. *Municipal Council* v. *Vardichan*, (1980) 4 SCC *i6z:* 1980 SCC (Cri) 933: 1980 Cri LJ 1075.
25. *Abdul Hamid* v. *Gwalior Rayons Silk Mfg. Co. Ltd.*, 1989 Cri LJ 2013
26. *State of M.P.* v, *Kedia Leather & Liquor*, {2003) 7 SCC 389: 2003 SCC
27. *Ram Autarv. State ofU.P.*, (1963) 1 Cri Lj 14, 15-16: AIR 1962 SC 1794: see also, *Sallitho Ores* v. *Bhimappa*, 1979
28. *Noise Pollution ($}, re*, (2005} 5 SCC 733: AIR 2005 SC 3136.
29. *Krishna Gopal* v. *State of M.P.*, 1986 Cri LJ 396 (MP).
30. See, *Mohd. Ahsan* v. *State*, 2000 Cri LJ 2504 (Raj).
31. *Donniiigton Tea Factory* v. *S.D.M., & Sub-Collector, Connoor*, 1998 Cri Lj 3585 (Mad).

manufacturing adulterated tea powder, the Madras High Court held that that order was not proper. The court's response is revealing:

> In the light of these observations if we look at the impugned order, it is clear that it cannot be said that there is an imminent danger to the health or physical comfort of the community in the locality at present. The act of the petitioners must be injurious *in praesenti.* The mere manufacturing of the tea powder suspected to be adulterated would not be construed to be an act of causing imminent injury to the health or physical comfort of the community.[32]

The court also pointed out that at present it is possible for the authorities to take action under the Prevention of Food Adulteration Act or Essential Commodities Act.

The word "regulated" in clause *(b)* of Section 133(1) indicates that the court, instead of prohibiting the trade etc. completely, can regulate the same in such a way as not to become a nuisance.[33]

Clause *(d)* of Section 133(1) does not specify the minimum number of persons that should be living or carrying on business in the neighbourhood *etc.* Therefore if more than one person is living etc. that will amount to persons, and the provisions of Section 133 will be attracted. The requirement of the section is satisfied even if the danger is confined to the members of a single household.[34]

However, the proceedings are summary, and are more in the nature of civil rather than criminal proceedings.[35] It has also been opined that in passing a conditional order under Section 133, the Magistrate is not bound to take evidence.[36] However, In a case seeking removal of a dilapidated house, the Magistrate was advised by the Madhya Pradesh High Court to get the opinion of an engineer before ordering demolition.[37]

{b) Service or notification of order.—The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons. [S. .134(1)]

If such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person. [S. 134(a)]

The provisions regarding service of summons are contained in Sections 6z to 68 and have already been discussed in para. 5.3.

32. *Ibid*, 35S7.
33. *Gobind Singh* v. *Shanti Sarup*, (1979) 2 SCC 2.67, 269: 1979 SCC {Cri} 444, 447: 1979 Cri LJ 59; *also see*, observations in
34. *Somnath* v. *State*, 1974 Cri Lj 522, 524 (Goa JCC); see also, *State of Kerala* v. *Chacko*, (1962) 2 Cri LJ *666, 667* (Ker); *Vayalele Veettil Balakrishna Nambiar* v. *R. Madhavan*
35. *Kachrulal Bhagirath Agrawal* v. *State of Maharashtra*, (2005) 9 SCC 36; 2005 SCC (Cri) 1191.
36. *Tejmal Punamchand Burad* v. *State of Maharashtra*, 1992 Cri LJ 379
37. See , *Niranjan Singh* v. *State of M.P.*, 2009 Cri LJ (NOQ 944 (MP).

(c) *Person to whom the order is addressed to obey or show cause.*—The person against whom such order is made shall

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) Appear in accordance with such order and show cause against the same. [S. 135]

A conditional order under Section 133 gives the defaulting party two options—either to comply with the conditional order passed or to appear and show cause against the same. Where, by a corrigendum to order issued by SDO, he substituted word "or" by "and". The corrigendum was set aside on the ground that the very essence of scheme under Section 133 has been tinkered with.[38]

(d) Consequence of his failing to do so.—If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code and the order shall be made absolute. [S, 136]

Section 136 clearly shows that a preliminary order made under Section 133 can be made absolute if a person fails to appear on receipt of preliminary order. If such person appears and denies the public right and thereafter fails to appear to lead evidence the Magistrate cannot invoke Section 136 to make the preliminary order absolute.[39]

Procedure where existence of public right is denied

In this connection Section 137 provides as follows:

28.18

Procedure where existence of public right is denied

137. (1) Where an order is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under Section 138, inquire into the matter.

(2} If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in Section 138.

{3) A person who has, on being questioned by the Magistrate under subsection (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

38. *Rohan Vaman Savaiker* v. *State*, 2010 Cri LJ 2719 (Bom).

39. *Pavithran Madukkani* v. *Konjukochu*, 1982 Cri LJ 103, 104

The expression "inquire into the matter" used in sub-section (i) above has reference very ciearly to the denial of the existence of the public right made by the person against whom the conditional order under Section 133 is passed. This interpretation of the expression is reinforced by the other expression used in the same sub-section *viz.* "before proceeding under Section 138", which clearly means that the inquiry respecting the merits of the alleged obstruction or nuisance is to be deferred until a decision has been recorded on the denial of public right. The matter is further clarified by sub-section (2} which enjoins that if the person proceeded against has been able to establish prima facie his denial of the public right respecting the way, river, channel or place concerned, the Magistrate will cease to proceed further with the case until "the matter of the existence of such right has been decided by the competent civil court". If however,

0 the evidence led by the person is altogether frivolous, the Magistrate has been given jurisdiction to proceed with the case in the manner provided in Section 138. Sub-section {3) also yields an identical conclusion. It is therefore evident that the enquiry contemplated by Section 137 is confined only to the denial of the public right made by the person against whom the conditional order is issued, and that it has nothing to do with the inquiry made for determining whether or not the conditional order made under Section 133(1) is reasonable or proper. This latter inquiry can be made after the inquiry contemplated by Section 137 has resulted in a finding against the person to whom the conditional order was issued.[40]

The scope of the inquiry under Section 137 is only to find whether there is prima facie reliable evidence in support of the case taken by the opposite party about denial of the existence of public right.[41]

The expression "reliable evidence" as used in sub-sections (2) and (3) of Section 137 means evidence on which a competent court may place reliance. The expression does not mean "evidence" which definitely establishes the right of claim. It is not expected that the Magistrate should weigh the evidence produced by both the parties and then come to the conclusion which is more reliable or should be preferred. The object of Section 137 is that if the denial of the public pathway etc. involves a bona fide claim on the part of the persons denying the public right, the matter should be decided by a competent civil court and not by a Magistrate in a summary inquiry provided under Section 137.[42] It has been held in

40. N.L. *Singh*
41. *Arnar Singh*
42. *Jai Ram Singh*

Omanakutty Amma v. *Sajeev Kumar,* M.R.[43] that the term "reliable evidence" must be interpreted strictly and a mere "copy of plaint" filed in a civil court cannot be treated as evidence as required under Section 137(a).

If the Magistrate omits to question the person concerned when he appears before him after a conditional order was made under Section 133 and puts in a statement in writing denying the existence of public right, the omission may be an irregularity curable under Section 465; but if the Magistrate holds a joint enquiry under Sections 137 and 138 or allows the complainant to adduce evidence in rebuttal of the evidence of the objector and scrutinises or weighs the evidence of the parties with a view to determine the truth of the denial or to arrive at the finding whether the non-existence of the public right is conclusively established it would not be a case of mere irregularity which could be cured by Section 465 but would be beyond the jurisdiction of the Magistrate.[44] The failure to comply with the procedure contained in Section 137(1) cannot be brought within the domain of a curable irregularity. It is a defect vitally affecting the jurisdiction of the order and hence non-compliance with this mandate vitiates the orders.[45]

When the party appears and denies the public right, the Magistrate has to enquire into the denial put forward and pass appropriate orders on such inquiry in accordance with Section 137(2). If the party against whom the preliminary order is passed fails to appear to lead evidence in support of his denial the Magistrate has to enter into the second stage contemplated in Section 138 and enquire about the existence of the public right alleged by taking evidence in the matter as in a summons case. Section 137(3} places an embargo upon a person against whom a preliminary order is passed and who fails to lead evidence in support of his denial and that embargo is against his giving any evidence in the enquiry under Section 138 in support of the denial of the public right. After such inquiry the Magistrate can under Section 138(2} on being satisfied that the order is reasonable and proper either make the order absolute without modification or, as the case may be, with modification. If the Magistrate is not so satisfied the proceedings will have to be dropped. These are the limits set out by Sections 137 and 138.[46] In a case where the person against whom the complaint is made up a claim of private right to reside at the place his

43. 2011 Cri Lj 4140 {Ker).

44. *Anand*
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re v.

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46. *Pavitbran Madukkani* v. *Konjukocbu.* 1982 Cri LJ 103,

eviction without hearing him under Section 137 and without conducting inquiry under Section 138 will be bad in law.[47]

28.19 Procedure where he appears to show cause

Procedure where he appears to show cause

Section 138 provides as follows:

138. (1) If the person against whom an order under Section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case.

(a) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

It is clear from the provisions of sub-section (1} that if a person appears and show cause against the conditional order the Magistrate can make the order absolute under sub-section (2) only after taking evidence in the matter as in a summons case. The provision is mandatory.[48] It is imperative under Section 138 for the Magistrate to take evidence in the matter and therefore he cannot just dispose of the matter without taking any evidence. His inspection of the site will not be of any use.[49]

Though it is permissible for the Magistrate, after making the preliminary order, to make the order absolute when the party does not appear and show cause, *[see,* S. 136] but when he appears and shows cause, it is obligatory on the Magistrate, to record evidence and then after having satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, to make the order absolute with or without modification, as the case may be.[50]

It is not permissible to adduce evidence by way of affidavits in proceedings under Section 133, and the Magistrate is bound to record evidence in the same manner as is recorded in a summons case.[51]

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According to Section 354(6), every order under sub-section (2) of Section 138 shall contain the point or points for determination, the decision thereon and the reasons for the decision.

28.20

Power of Magistrate to direct local investigation and examination of an expert

The Magistrate may for the purposes of an inquiry under Section 137 or Section 138:

(a) direct a local investigation to be made by such person as he thinks fit,- or

(b) summon and examine an expert. [S. 139]

Local investigation does not merely mean one's own observation of the things but even ascertainment of facts by recording the statements of certain witnesses.[52]

Where the Magistrate directs a local investigation by any person under the above Section 133, the Magistrate may

(a) furnish such person with such written instructions as may seem necessary for his guidance;

(b) declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid. [S. 140(1)]

The report of such person may be read as evidence in the case. [S. 140(2)]

Where the Magistrate summons and examines an expert under Section 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid. [S. 140(3)]

28.21

Procedure on order being made absolute and consequences of disobedience

Procedure on order being made absolute and consequences of disobedience

Section 141 provides as follows:

141. (1) When an order has been made absolute under Section 136 or Section 138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he wall be liable to the penalty provided by Section 188 of the Indian Penal Code (45 of i860).

(z) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without such Magistrate's local jurisdiction and if such other property is without such jurisdiction, the order shall authorise its attachment and sale

52. *Amur Singh* v. *State of U.P.,* 1980 Cri Lj 1350, 1352 (All).

when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

(3} No suit shall lie in respect of anything done in good faith under this section.

Though a conditional order under Section 133 cannot be questioned by a civil suit according to Section 133(2), there is no bar to file a civil suit to establish one's rights which might have been affected by the absolute order passed under Section 13 8.[53]

It has been held that the order passed by a court cannot be reviewed by itself.[54] [55] [56]

28.22 Injunction pending inquiry

Section 142 provides as follows:

Injunction pending inquiry

142. (1} If a Magistrate making an order under Section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

{3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

This section is obviously controlled in its effect by Section 133.

The Magistrate can pass an interim order under Section 142(1) at any stage of the inquiry, whether the inquiry is one under Section 133 or Section 137 or Section 138. But he must satisfy himself that the conditions set out in Section 142(1) are fulfilled. Accordingly, an order under Section 142(1) could be passed only if the Magistrate considers that there is an imminent danger or inquiry of a serious kind to the public.[55] [56]

Though the section does not provide for notice before an injunction is issued, it is implied that the power to issue injunction should be exercised only after affording an opportunity to the person affected to be heard on the matter M

In a case where a building was demolished as a result of an illegal order passed without obtaining even a police report, the Rajasthan High Court said that when there was urgency within the meaning of Section 142 the passing of orders without giving notice or conducting any inquiry as contemplated by Sections 138, 139 and 140 must be regarded as improper.[57]

53. ***Chuni ball*** v. ***Ram Kishen Saba,*** ILR
54. ***Sashibbusan Tripathy*** v. ***State,*** 1985 Cri Lj
55. ***T.N. Sudhakaran*** v, ***E.M. George,*** 1973 Cri
56. ***Chamunny*** v. ***State of Kerala,*** 1979 KLT
57. *Shyam Sunder* v. *State of Rajasthan,* 199S

Magistrate may prohibit repetition or continuance of public nuisance **28.23**

A District Magistrate or Sub-Divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the IPC or any special or local law. [S. 143]

The order under the above section *i.e.* Section 143 can be passed only if the matter has been adjudicated by a competent court.[58] The disobedience of this order has been made punishable under Section 291 IPC.

PART V
Urgent Cases of Nuisance or Apprehended Danger

Power to issue orders in such cases

Section 144 provides as follows: 28.24

Power to issue order in urgent cases of nuisance or apprehended danger

144. (1) In cases where, in the opinion of a District Magistrate, a SubDivisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

{2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against w'hom the order is directed, be passed ex parte.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

{4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate w-ould have, but for such order, expired, as it may specify in the said notification.

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{5} Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-m-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

{7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

This is a well-known and frequently used section. It confers an omnibus power on senior Magistrates to issue orders in urgent cases of nuisance or apprehended danger. The wide range of situations in which Magistrates may resort to this power in the public interest will be apparent from a reading of sub-section (i).[59] The section confers powers to issue an order absolute at once in urgent cases of nuisance or apprehended danger. Such orders may be made by specified classes of Magistrates when in their opinion there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable. It requires the Magistrate to issue the *order in writing* setting forth the material facts of the case and the order is to be served in the manner provided by Section 134.

The order may direct
(A) any person to abstain from a certain act, or

(B) to take certain order with respect to certain property in his possession or under his management.

The grounds for making the order are that, in the opinion of the Magistrate, such direction

(a) is likely to prevent, or

(b) tends to prevent,

(/} obstruction;

(ii) annoyance; or

{in) injury, to any person lawfully employed; or *{iv)* danger to human life, health or safety; or

{v) a disturbance of the public tranquillity; or (tn) a riot; or *{vii)* an affray.

Stated briefly the section provides for the making of an order which is either (A) prohibitory, or (B) mandatory as shown above.[60]

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The gist of action under Section 144 is the urgency of the situation, its efficacy is the likelihood of being able to prevent some harmful occurrences.[61] As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequence sufficiently grave. Without it the exercise of power would have no justification. Ordinarily an order under Section 144 should not be made without affording an opportunity to the person against whom it is proposed to be made, to show cause against the same and if no notice is issued the Magistrate should record his reasons to show that the occasion is considered to be one of emergency, failing which the order made ex parte cannot be sustained. The order should not be bald but should contain at least some reasons to show that the Magistrate has applied his mind and was satisfied about the existence of factors necessary for action under Section 144.[62] It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order under Section 144 cannot be passed without taking evidence.[63] The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. Ordinarily the order would be directed against a person found acting or likely to act in a particular way. A general order, however, may be necessary when the number of persons is so large that distinction between them and the general public cannot be made without the risks mentioned in the section. A general order is thus justified but if the action is too general the order may be questioned by appropriate remedies for which there is ample provision in the law.[64]

The authority of the Magistrates exercising powers under Section 144 is neither absolute nor supreme but subject to supervision and revision by the higher courts and therefore the Magistrates in order to act legally and with propriety, must indicate with reasonable fullness the materials on which they conclude that there was some emergency justifying their actions, so that the higher courts may check and brake them and put them back on rails when they go off.[63]

discussion regarding the principles upon which the jurisdiction under S. 144 is to be exercised, see, *Mobd. Gulam Abbas* v. *Mohd. Ibrahim,* (1978) 1 SCC 226, 227: 1978 SCC (Cri) rod, 107: 1978 Cri LJ 496.

61. See, observations in *Jagdishwaranand* v. *Police Gommr.,* 1983 Cri LJ 1872 (Cal).

62. *B. LingaMurthy* v. *B. Hussain Sabeb,* 1979 Cri Lj 1147, 1149 (AP); see also, *Gopalfi Prasad* v. *State of Sikkim,* 1981 Cri Lj 60, 63 (Sikk).

63. *Jagrupa Kumari* v. *Chotay Ndrain Singh,* (1936) 37 Cri LJ 95, 97 (Pat); *Madbu Limaye* v, *Sub-Divisional Magistrate, Monghyr,* (1970) 3 SCC 746: 1971 Cri Lj 1720, 1730.

64. *Madhu Limaye* v. *Sub-Divisional Magistrate, Monghyr,* (1970) 3 SCC 746: 1971 Cri LJ 1720, 1731. S

65. *Gopalfi Prasad* v. *State of Sikkim,* 1981 Cri LJ 60, 62 (Sikk); see also, S.S. *Venkataramana* v. *Emperor,* (1918) 19 Cri LJ 56 (Mad).

The provisions of Section 144 must be construed in the light of the provisions of the Constitution in clauses *{%)* to (6) of Article 19 and when so construed, the conclusion would be inevitable that the obstruction, annoyance or injury or any other danger or disturbance sought to be prevented "must" as indicated by the Supreme Court in the *Madhu Limaye case*[66], "assume sufficiently grave proportions to bring the matter within the interests of public order" or general public or any other matter specified in clauses (2) to *{6)* of Article 19;[67]

A ban on sale of State organised lottery in Delhi was held valid by the Delhi High Court. The court reasoned that the State organised lottery is a subject which falls within Entry 40 of List I of the VII Schedule of the Constitution and a law with regard thereto is in the exclusive domain of Parliament. The ban in question has been imposed in exercise of the administrative power conferred on the authority under Section 144 of the Code as the activity comes within its field of operation.[68]

An order issued under Section 144 is essentially an executive order passed in performance of an executive function where no *Us* as to any rights between rival parties is adjudicated but merely an order preserving peace is made and as such it will be amenable to writ jurisdiction either under Article 32 or under Article 226 of the Constitution if it violates or infringes any fundamental right.[69] [70] [71] *

The words "abstain from a certain act" in sub-section {1} do not empower the Magistrate to order a person to do particular acts, and the Magistrate cannot assume such power even in the garb of making a negative order.[70] [71] An order under Section 144 must be of a temporary character, which means that it must not be irrevocable in its nature or partake of the character of a perpetual injunction.[73]

In the case of a dispute as to the possession of any property coming under this section, the proper course for the Magistrate is to ascertain which party is in the wrong and is interfering with the exercise of the legal right of the other party. Thereafter the Magistrate should direct that party to abstain from a certain act or take certain order with respect to the property in his possession if the Magistrate considers that such

66. *Madhu Limaye*
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68. *A kbit Bkartiy*
69. Gulam
70. ***Rama nlal Bhogil***
71. ***M.E.*** v. ***Kanyir***

direction is likely to prevent or tends to prevent danger to human life etc. as spelled out in Section 144.[72]

Regarding the nature and use of the power given under Section 144, the Supreme Court has observed:

> The entire basis of action under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity... [For this purpose] it may become necessary for the Executive Magistrate to override temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves, for, it is obvious that when there is a conflict between the public interest and private rights the former must prevail. It is further well settled that the section does not confer any power on the Executive Magistrate to adjudicate or decide disputes of civil nature or questions of title to properties or entitlements to rights hut at the same time in cases where such disputes or titles or entitlements to rights have already been adjudicated and have become the subject-matter of judicial pronouncements and decrees of civil courts of competent jurisdiction then in the exercise of his power under Section 144 he must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquillity the exercise of power must be in aid of those rights and against those who interfere with the lawful exercise thereof and even in cases where there are no declared or established rights the power should not be exercised in a manner that would give material advantage to one party to the dispute over the other but in a fair manner ordinarily in defence of legal rights, if there be such and the lawful exercise thereof rather than in suppressing them. In other words, the Magistrate's action should be directed against the wrong-doer rather than the wronged. Furthermore, it would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would affect only a minor section of the community rather than prevent a larger section more vociferous and militant.[73]

The Supreme Court has had occasion to reiterate the importance of Section 144 in *RamUla Maidan Incident, re*[74]. The court said that Section 144 enumerates the principles and declares the situations where exercise of rights recognised by law, by one or few, may, conflict with other rights of the public or tend to endanger public peace, tranquility and for harmony. The orders passed under Section 144 are attempted to serve larger public interest and purpose under the provisions of the Code.

;2. *Bifay Kumar Dahnia* v. *Sanwarmal Jalal,* 1988 Cri Lj 712 (Gau).
73. *Gulam Abbas* v. *State of U.P.,* {1982) 1 SCO 71: 1982 SCC (Cri) 82, 115-16: 1981 Cri Lj 1835. /4. {203.2} 5 SCC 1: (2012} z SCC {Cri) 241: 2012 Cri LJ 3516.

The executive direction contained in the "Important Announcement" issued by the State Government, insofar as it held out to the members of the public the threat that a curfew-breaker for the mere breach of the curfew order would be liable to be shot at, was held by the Gujarat High Court as ultra vires the executive powers of the State Government and also ultra vires Section 144 of the Code, Section 188 IPC and Articles 20 and 21 of the Constitution and was, therefore void and of no effect whatsoever.

On a perusal of Sections 144(1), {2), (3) and (4) along with the proviso will make it crystal clear that the period of 60 days has to be calculated from the date on which the prohibitory order has been passed at the time of initiation of the proceeding.[75] [76]

Under Section 144(5) and (7) any Magistrate may rescind or alter his own order or an order passed by his predecessor or of any Magistrate subordinate to him. This is a salutary provision so that the party, who has not been heard by the Magistrate while passing an ex parte order under Section 144(2) and who feels aggrieved, can either approach the same Magistrate or a Magistrate to whom the Magistrate passing the order is subordinate. But that does not mean that by reason of this provision the revisional jurisdiction of superior courts he. of the High Court and of Court of Session, is taken away.[75] [76] [77] Where the order under Section 144 purports to affect the future rights of the parties, the High Court may, in an appropriate case, set aside the order even though it was time expired or had spent its force.[78]

Is the High Court (or the Court of Session) competent to go into the propriety of the State Government's order extending the duration of the order passed by a Magistrate under the proviso to Section 144(4)? No doubt the High Court's revisional powers are wide. But this specific question does not seem to have been decided so far.[79]

Amendment by way of insertion of Section 144-A in the Code by Section 16 of Amending Act 25 of 2005, and insertion of new Section 153- AA in IPC by Section 44(a) of Act 25 of 2005 will come into force from a date to be notified. Enforcement of Section 144-A will be of very much importance inasmuch as it enhances the security proceedings. It can now be possible to prohibit a person or group of persons who indulge in display of aggressiveness by show of arms. The District Magistrate can ban

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76. *Mania*
77. *D, Appar ao* v. *C. Simha*
78. *Binde shwar*
79. *Sea,*

such activities and the period of validity of such notice, initially for three months could be extended upon six months by the Court. These powers of the State Government can be delegated to the District Magistrate. New Section 153-AAIPC makes it an offence to carry arms in any procession.[80 81]

Part VI

Disputes as to Immovable Property

28.25 Preventive measures in respect of disputes as to immovable property

Since disputes over land and water, crops and other produce of land and rights of user in respect of immovable property often result in breach of the peace, violence and bloodshed, this part containing as 145 to 148 arms the magistracy with powers to intervene at an incipient stage of the dispute and compel the disputants to have recourse to legal remedies. Experience over the years has proved the usefulness of these provisions in the Code.®[1]

All the powers conferred by these sections vest in the Executive Magistrates. However it has been provided by Section 478 that "if the Legislative Assembly of a State by a resolution so permits, the State Government may, after consultation with the High Court, by notification, direct that references in Sections 145 and 147 to an Executive Magistrate shall be construed as references to a judicial Magistrate of the First Class". Thus the effect of Section 478 would be that the State Government, with
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81. *See*, 41st Report, p. *61*, para. IZ.I.

the concurrence of the State Assembly and after consultation with the High Court, can transfer the functions under the sections from Executive Magistrates to judicial Magistrates of the First Class.

28.26 Preventive measures in respect of land or water disputes

In this connection Section 145 provides as follows:

Procedure where dispute concerning land or water is likely to cause breach of peace

145. (1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

{3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

{4) The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information w-as received by the Magistrate, or after that date and before the date of his order under subsection {1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (z).

{5} Nothing in this section shall preclude any party so required to attend, or any other person interested, from showung that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) *(a)* If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

{b) The order made under this sub-section shall be served and published in the manner laid down in sub-section {3}.

(7} When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale- proceeds thereof, as he thinks fit.

(9} The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107.

The object of this section is to provide a speedy remedy for the prevention of breaches of the peace arising out of disputes relating to immovable property. The Code contemplates a determination of this question without any reference to the merits of the respective claims of the disputing parties as to the right to possess the subject of dispute. The question of possession, moreover, has to be determined with reference to a specified point of time, namely the date of the initial order, or in the case of forcible dispossession, the date within two months next preceding the date on winch the report of a police officer or other information regarding the dispute was received by the Magistrate.[82]

The existence of a civil suit can be no bar in law to the initiation of a proceeding under Section 145.[83] The Supreme Court has declared that a concluded order under Section 145 made by a competent court would not be defeated simply because the unsuccessful party has approached the civil court. The order deals only with factum of possession. It is subject to the decision of civil court which can give a finding different from that which the Magistrate has reached.[84]

The jurisdiction of the Magistrate under Sections 145 and 146 to maintain peace will prevail over the orders of the civil court except where /} the determination of rights by the civil court has become final, or *it)* the

82. ***See,*** the observations in ***Tara Pada Biswas*** v. ***Nurul Haq Mia,*** (3905} 2 Cri Lj 679, 684: ILR (1906)

32. Cal 1093, 1099-1100; see also, ***Devi Prasad*** v. ***Sheodal Rai,*** (1907) ***6*** Cri Lj 35Z: ILR {1907) 30 All 43, 42; ***Paqir***

83.***Shamrati Kuer*** v. ***Janki Saran Singh,*** 1981 Cri LJ 978, 980 (Pat); ***Dominic*** v. ***Slate,*** 1987 Cri Lj

84. ***Jhummamai*** v. ***State of M.P.,*** (1988} 4 SCC 452: 3988 SCC (Cri) 974: 1989 Cri Lj 82.

civil court has appointed a receiver vide Section 146(2}, The requirements of peace are paramount, the orders of the civil court notwithstanding.[83]

When a suit in respect of law involving question of possession is pending in the civil court and the court has passed interim injunction restraining interference with the possession, initiation of parallel criminal proceedings under Section 145 and 146 would not be justified.[85] [86]

In order to take preventive action under Section 145 two essential conditions must be satisfied: *i)* there must be dispute relating to land or other objects mentioned in sub-section (i); and *ii)* the dispute is likely to cause a breach of peace.[85] * [87] If there is no dispute there is no obligation on the part of the court to pass orders under Section 145.[88] The Executive Magistrate exercising jurisdiction under this section must be satisfied about these grounds either from a police report or from *other information* which might include an application by the party dispossessed.[89] The term "satisfied" is of considerable expansiveness which means free from anxiety, doubt, perplexity, suspense or uncertainty. While passing a preliminary order under sub-section (1) all that is necessary is that the Magistrate must be satisfied that there is a dispute in regard to the objects mentioned in Section 145 and that the dispute Is likely to endanger the peace.[90] The "satisfaction" of the Magistrate must be clear and unambiguous. Nothing short of that can give him jurisdiction under Section 145.[91] Sub-section {1) requires that while making the preliminary order in writing the Magistrate shall state "the grounds of his being so satisfied". However it has been held that where the Magistrate has expressed his satisfaction on the basis of the facts set out in the application or the police report before him, it would mean that those facts were prima facie sufficient and were the reasons

85. ***Ashrafi Lai*** v. ***Labb Singh,*** 1981 Cri Lj 1172., 1176 (Del); ***see also,*** observations in ***Iqbal Singh v. State of Haryana,*** 1985 Cri LJ 1757 (P&H); ***Jagdish*** v. S.D.M., ***Panipat,*** 1987 Cri LJ 1198 (P&H) distinguishing ***Ram Sumer Puri Mahant*** v. ***State***

$6. *Gram Panchayat, Garh Sarnai* v. *Panipat,* 1987 Cri LJ 1326 (P&H); *Kara Sumer*

Puri Mahant v. ***State ofU.P.,*** {1985) 1 SCC 427: 19S5 SCC (Cri) 98: 1985 Cri LJ 752; ***Udmi Ram*** v. ***Dharam Singh,*** 1989 Cri LJ 1522 (Raj); ***Keshavrao*** v. ***Radheshyam,*** 1991 Cri LJ 283 (MP);

87. ***Pandurang Govind, re,*** ILR (1900) 24 Bom 527, 531; ***Krishna Kamini*** v, ***AbdulJubbar,*** ILR (1903) 30 Cal 155, 200 (FB); S.M. ***Yakub*** v. T.N. ***Basu,*** (1949) 50 Cri LJ 299: ILR (1948) 27 Pat

S 88. ***Mangilalw Bangmal,*** 1988 Cri LJ 1905 (MP).

89. ***R.H. Bbutani*** v. ***Mani J, Desai,*** 1969 Cri LJ 13, 17: AIR 1968 SC 1444; ***Raja La! Singh*** v. ***Ra?n Prasad,*** 1975 Cri LJ 1268, 1271 (Pat); ***Moti*** v. ***State,*** 1976 Cri LJ 1956, 1957 (HP); ***Kauleshari*** v. ***Binda Pandey,*** 1976 Cri LJ 649 (Pat); ***Shamrati Kuer*** v. ***Janki***

90. ***Paqir Chand*** v. ***Bhana Ram,*** {1957} 58 Cri LJ 1450: AIR 1957 Punj 303; ***Madho Singh*** v. ***Ladan,*** 1974 Cri LJ 1164, 1165

91. R.N. ***Lotlikar***v. C. ***Figueiredo,*** 1974 Cri LJ 715, 716 (Goa JCC); ***Laxman*** v. ***Bahimkhan,*** 1976 Cri LJ 1492, 1498 (Bom);

leading to his satisfaction.[92] The order in writing passed by Magistrate under sub-section (i) must be clear, precise and full so as to give complete idea of the case to the parties concerned. This preliminary order is considered so basic that a failure to draw it up has been held by several High Courts to vitiate all the subsequent proceedings.[93] In a case involving dispute over stoppage of water for irrigation from common well the final order passed on a notice drawn up under Section 145(f) by Mandal Revenue Officer rather than by the Mandal Executive Magistrate that too without mentioning the date and time for the appearance was held not proper. The A.R High Court also opined that the proceedings should have been initiated under Section 147 rather than under Section 145.[94] The preliminary order can be modified at any stage if the Magistrate is satisfied that he has gone wrong in certain respects or that no emergency exists.[95]

At the completion of the inquiry under sub-section {4) the Magistrate is required to decide whether any, and if so which, of the parties was, at the date of the order made by him under sub-section {1), in actual possession of the property which is the subject of dispute. If, however, it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate or after that date and before the date of his order under sub-section (1), he may treat such party as if it had been in possession on the date of the order under sub-section (1). Here, the word "dispossessed", means and includes to be out of possession, ousted, ejected, removed from the premises or excluded. Even a person having a right to possession cannot dispossess another by taking the law into his hands and making a forcible entry otherwise than in due course of law.[96]

The words "forcibly and wrongfully" qualifying the word "dispossessed" in the proviso to Section 145(4) cannot be given a restricted meaning of dispossession accompanied by the use of criminal force as defined in Section 350 IPC. To constitute forcible possession, even the use of misrepresentation and improper threats would make the dispossession "forcible and wrongful".[97] However, a contention that as the dispossession of the petitioner was continuing and it amounted to a continuing wrong and,

92. *R.H. Bhutani* v. *Mam J. Desai*, 1969 Cri LJ 13, 17: AIR 1968 SC 1444; *Gurdeu Singh* v. *State of*
Punjab, 1975 Cri LJ 1434, 1435 (P&H); ***Amarnath*** v. ***K.***
joginder Singh, 1976 Cri LJ 39L **395** (HP); Sri ***Chand*** v.
93.***Matburalal*** v. ***Bbanwarlal,*** (1979) 4 SCC 665, 670: 1980 SCC (Cri) 9, 15: 1980 Cri LJ 1, 6*;* see
also, ***Gabrial Thankayyan*** v. ***Narayanan Nadar,*** 1977 Cri LJ
94.*Edla Anjaiah* v. *Purumalla Mallesham,* 1998 Cri LJ 750 (AP).
95.***K.K. Nair*** v, ***Kunhi Mohammed Haft.*** 1971 Cri LJ 218, 219 (Ker).
96. *Tarulata Devi* v. *Nikhil Bandbu Mishra,* 1982 Cri LJ 1665, 1667 (Gau).
97.*P,K. Antia* v. *Shridhar Sadashiv,* 1982 Cri LJ 1463 (Bom).

therefore, the proviso to Section 145(4} must be deemed to be satisfied, cannot be accepted by the court.[1]

The inquiry under sub-section (4) is limited to the question of actual possession on the relevant date and is not concerned with the claims and merits of the parties in regard to the *right to possess* the subject of dispute.[2] The Magistrate making the inquiry is required to *peruse* the statements put in by the parties in response to the order made under sub-section (1), and to hear the parties and receive the evidence produced by the parties.[3 4 5] It has been held that for deciding the question of possession it is evidence rather than affidavit that has to be relied upon by the court.[4 5] An order which does not consider these matters is *ex facie* improper as not complying with the mandatory provisions of Section 145(4)2 It is the duty of the trial court to make every effort to follow the mandatory provisions laid down under Section 145. It has been observed that the procedures laid down in Section 145 should be very carefully followed and that if they are not followed, or overlooked, it must be held that the actions of the trial court are without jurisdiction.[6]

According to Section Z74, in all inquiries under Sections 145 to 148 the Magistrate is required to make a memorandum of the substance of the evidence of each witness in the language of the court. If the Magistrate is unable to make such memorandum himself, he is required, after recording the reason of his inability, to cause such memorandum to be made in writing or from his dictation in open court. Such memorandum is to be signed by the Magistrate and then it forms part of the record. Failing to comply with these requirements of Section 2,74 would vitiate the proceedings.[7]

Considering the effect of sub-section (5) of Section 145, it has been held that where the existence or the apprehension of breach of peace is challenged and evidence is led, the Magistrate must record a finding one way or the other because the very foundation of the jurisdiction of a Magistrate in cases under Section 145 is based on the existence of a dispute giving rise to apprehension of breach of peace. It has been the constant view of the High Courts that as soon as the apprehension of breach of peace ceases to exist or if it never existed, the jurisdiction of the Magistrate to proceed

1. ***R.C. Patuck*** v. ***Fatima A. Kmdasa,*** (1997) 5 SCC 334: 1997 SCC
2. R.H. ***Bbutani*** v. ***Mam J. Desai,*** 1969 Cri LJ 13, ***16:*** AIR 1968 SC 1444; ***Kusum v. Saniya Bai,*** 197j Cri LJ 1135, 1137
3. ***N.A. Ansari*** v. ***Jackiriya,*** 1991 Cri LJ 476 (Mad).
4. ***Indira*** v. ***Vasantha,*** 1991 Cri LJ 179S (Mad).
5. ***Narayan Kntty Menon*** v. ***Sekhara Menon,*** (1964} 2. Cri LJ 682.: AIR 1964 Ker 308, 309; ***Kusum*** V. ***Soniya Bai,*** 1975 Cri LJ 1135,1136-37 (Bom); ***Cbandrakalabai*** v. ***Sharadcbandra,*** 1975 Cri LJ 1294, 1296 (Bom); C.
6. ***D ban bar AH*** v. ***Haripada Saha,*** 197 6 Cri Lj 1924, 1926 (Gau).
7. *Somappa Ningappa* v. *Taluka Executive Magistrate,* 1982 Cri LJ

with the case ceases and the only order he has to pass is to drop the proceedings and to release the property in dispute.[8]

On dropping the proceedings under Section 145(5), the Magistrate does not become *functus officio.* He has the jurisdiction to make any incidental or consequential orders by way of winding up of the proceedings and restore possession of the attached property to the party or persons from whom the possession had been taken over at the time of attachment.[9]

If a person was given possession of land by the court at the conclusion of the proceedings under Section 145 of the Code and if he was again dispossessed by the opposite party it would not be correct to say that the party dispossessed has got no remedy to seek enforcement of the order of the court and that his only remedy is to file a suit in a summary way *(i.e.* under the Specific Relief Act) or to make a complaint against the opposite party under Section 188 IPC. The court has got inherent power to effectuate and implement its own order, in order to prevent a recalcitrant party from defying the orders and to see that the majesty of law is maintained.[10 *]

In a case the appellant was put in possession of the house with the help of police in execution of eviction proceedings. However, one of the respondent resisted this by filing a title suit. And in pursuance of a firing incident the SDM under Section 144 restrained both the parties from entering the house. However, later put the appellants in possession of the property. The respondent then filed a petition under Section 145. However, it was dismissed. Then he moved the High Court under Section 482 to quash the order. High Court set aside SDM's order. On appeal, the Supreme Court put the appellant in possession as it was in pursuance of the decree of eviction that they were given possession and it had become final as none challenged that order.[15]

It may be noted here that according to Section 354(6) every final order made under Section 145 is required to contain the point or points for determination, the decision thereon *and the reasons for the decision.*

However, once a preliminary order drawn by the Magistrate under Section 145(1) sets out the reasons for holding that a breach of the peace exists, it is not necessary to have such a finding again at the time w'hen the final order is passed, nor is there any provision in the Code requiring such a finding in the final order.[12 *]

8. *Sankatha Singh* v. *Rahmat Ullah,* 1973 Cri Lj 1091, 1093 (All); *Gujarat* v. *Collector Singh,* 1975 Cri LJ 102.6, 1044 (All) (FB); *Sarjoo* v. *Babadin,* 1975 Cri Lj 1562, 1563 (All); *Thekkethodlka*

9. *Wajid Mirza* v. *Mohd. All Ahmed.* 1982 Cri Lj 890, 894 (AP).

10. *Misri* v. *Nazir Hussain,* 1976 Cri Lj 924, 925 (J&K).

31. *Raid Raman Prasad* v. *State of Bihar,* (1993) 2 SCC 3: 1993 SCC (Cri) 489.

12. *Rajpati* v. *Bachan,* (1980} 4 SCC 116: 1980 SCC (Cri) 927, 929: 1980 Cri Lj 1276; see also. *Ram* v. *Banwari Lai,* 1967 Cri Lj 1051 (Punj).

It has been held that an order under Section 145 is not interlocutory whereas the one under Section 146 is and hence such an order under Section 146 can be revised,[13]

28.27

Power to attach subject of dispute and to appoint receiver

Attachment of disputed property and appointment of receiver

In this connection Section 146 provides as follows:

> 146. (1) If the Magistrate at any time after making the order under subsection (x) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof:
>
> Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.
>
> (2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908):
>
> Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any civil court, the Magistrate—
>
> *(a)* shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;
>
> *(b)* may make such other incidental or consequential orders as may be just.

After a preliminary order has been made under Section 145(1}, three contingencies have been contemplated in which an order of attachment under this section can be passed:

- *(i)* when the Magistrate is satisfied that the case is one of emergency; or
- *(ii)* if the Magistrate after inquiry holds that none of the parties was then in such possession as is referred to in Section 145; or
- *(Hi)* if the Magistrate is unable to satisfy himself as to which of the parties was in such possession on the appropriate date

13. *Indrapuri Primary Coop. Housing Society v. Bhabani Gogoi,* 1991 Cri LJ 1765 (Gan).

It is open to the Magistrate while initiating a proceeding under Section 145 to attach the subject matter in dispute without hearing the other side.[54] The purpose of Section 145 being to prevent a breach of peace, attachment can be straightaway ordered in case of emergency without notice to the opposite party.[14] [15] However, the Magistrate cannot appoint a receiver without passing an order attaching the property under Section 146.[16]

It is true that the satisfaction of the Magistrate that action under Section 145(1) is called for, must necessarily precede the finding that the case is of emergent nature requiring attachment of property. However, from this, it does not necessarily follow that the satisfaction of the Magistrate under Section 145(1) and the finding of emergency cannot be recorded in the said sequence in a composite order.[17] [18]

For considerable time, the High Courts while interpreting Sections 145 and 146 were divided over the issue as to whether the Magistrate's jurisdiction under Section 145 comes to an end on attachment of the disputed property under Section 146(1) on the ground of emergency. In *Mathuralal* v. *Bhanwarlat*[s], the Supreme Court has set at rest the controversy. According to the Supreme Court, Sections 145 and 146 together constitute a scheme, and Section 146 is to be read only in the context of Section 145. Therefore, except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), [a] proceeding initiated by a preliminary order under Section 145(1) must run its full course. Now, in a case of emergency, a Magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected. There Is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the inquiry as prescribed by Section 145(4) is against any such implication. Suppose a Magistrate draws up a preliminary order under Section 145(1) and immediately follows it up with an attachment under Section 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile if he is to have no further jurisdiction in the matter.

14. ***Gaya Singh*** v. ***Donum Singh, 1979*** Cri LJ it 10, 1113 (Pat) (FB); ***Ashrafi Lai*** v. ***Labh Singh,*** 1981 Cri Lj 1172, 117S (Del).
15. *Tulsi Devi* v. *Bhagai Ram,* 1983 Cri Lj 72. 74 (HP); see also, *Sheo Mangal Choudbary* v. *State of* ***Bihar,*** 1992 Cri Lj 34 (Pat); ***Ganpat Singh*** v. ***State,*** 1995 Cri LJ ***616*** (Raj).
16. ***Kisun Yadav*** v. ***Asharfi Yadav,*** 1991 Cri Lj 160 (Pat).
17. *Nichhattar Siftgb* v. *Gurinder Singh,* 1983 Cri LJ 718, 720 (P&H); see also, *M.A. Rahaman* v. *State* ***of A.R.,*** 1981 Cri LJ 1291 (AP); but ***see*** somewhat different view in ***Mahendra Tiwary*** v. ***Lai Pari Devi,*** 1982 Cri LJ 17, 18 {Pat}; ***K. Mavunni*** v. ***State of Kerala,*** 1982 Cri LJ 468 (Ker). [18]

18. (1979) 4 SCC 665: 19S0 SCC (Cri) 9: 1980 Cri LJ 1.

And yet he cannot make an order of attachment under Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section i45(i)d[9] There is no reason why a construction which will lead to such inevitable contradictions should be adopted.[19] [20] It is therefore wrong to hold that the Magistrate's jurisdiction ends as soon as an attachment is made on the ground of emergency. It should also be noted that the first of the situations in which an attachment may be effected under Section 146 has to be "at any time after making the order (preliminary order) under Section 145(1)", while the two other situations have, necessarily, to be at the final stage of the proceeding initiated by the preliminary order under Section 145(1).^ [22]

28.27.1 *Security proceedings*

In *Ashok Kumar* v. *State of Uttarakhand*[19] [20] [21] [22], the court has held that Sections 145 and 146 of the Code constitute a scheme for resolution of disputes threatening peace. Section 146 cannot be separated from Section 145. The Supreme Court's observations are illustrative of the import of these provisions:[23]

> The ingredients necessary for passing an order under Section 145(1) of the Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of a breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be material on record before the Magistrate when the submission of the parties is hied, documents produced or evidence adduced.

As mentioned above, Section 146(1) contemplates of three contingencies whereby an order of attachment of the subject matter of the dispute may be made. The abovementioned second and third contingencies can possibly arise only after the Magistrate has completed the enquiry as contemplated by Section 145(4), and here the Magistrate may pass an order of attachment until a competent court has determined as to which of the

19. *Sangam Kumar* v. *SDM, Robertsganj*, 1998
20. ***Ibid***, 16 [SCC (Cri)]. ***See also***, the observations of the Supreme Court in ***Chandu Naik*** v. ***Sitaram B. Naik,*** (1978) ***1*** SCC 210, 213: 1978 SCC (Cri) r00, 104: 1978 Cri
21. ***Mathuralal*** v. ***Bhamvarlal,*** (1979} 4 SCC 665: 1980 SCC
22. (20x3) 3 SCC 366: (2013) 3 SCC (Cri) 177.
23. ***Ibid,*** 181.

parties is entitled to possess the subject matter of the dispute. Therefore in such cases the proceeding under Section 145 must necessarily have been concluded. Whereas in the case of the first contingency an order of attachment may be made at any time after a proceeding under Section 145 is drawn up and before an order under Section 145(6) is made. Therefore, the proceeding is still alive after an order of attachment in the case of emergency is made and the Magistrate does not become *functus officio* after passing such an order.[24] In fact there is no bar for the SDM to pass a fresh attachment order if its earlier order of attachment was withdrawn under some circumstances.[25-7]

The Supreme Court has in *Skanti Kumar Panda* v. *Shakuntla Devi*[26], summed up the position of law with regard to the temporary nature of a criminal court's order under Sections 145 and 146:

> For the purpose of legal proceedings initiated before a competent court subsequent to the order of an Executive Magistrate under Section 145/146 of the Code of Criminal Procedure, the law as to the effect of the order of the Magistrate may be summarized as under:
>
> (1) The word 'competent court' as used in sub-section (i) of Section 146 of the Code do not necessarily mean a civil court only. A competent court is one which has the jurisdictional competence to determine the question of title of the rights of the parties with regard to the entitlement as to possession over the property forming subject-matter of proceedings before the Executive Magistrate:
>
> (2) A party unsuccessful in an order under Section 145(1) would initiate proceeding in a competent court to establish its entitlement to possession over the disputed property against the successful party. Ordinarily a relief of recovery of possession would be appropriate to be sought for. In legal proceedings initiated before a competent court consequent upon attachment under Section 146(1) of the Code it is not necessary to seek relief of recovery of possession. As the property is held *custo- dia legis* by the Magistrate for and on behalf of the party who would ultimately succeed from the court, it would suffice if only determination of the rights with regard to the entitlement to the possession is sought for. Such a suit shall not be bad for not asking for the relief of possession.[27]

The court added that the competent court does have jurisdiction to make interim order including an order of ad interim injunction inconsistent with the order of the Executive Magistrate.[28]

24. ***Anil*** v. ***Nagendra Chandra,*** 1981 Cri Lj 399, 400 (Cal); ***Ashrafi Lai*** v. ***Labh Singh,*** 1981 Cri Lj 1172, 1178 (Del)
25. ***Budhi*** v. ***Gyana,*** 1996 Cri Lj ***616*** (Raj).
26. (2004) 1 SCC 438: 2004 SCC (Cri) 320: 2004 Cri Lj 1249.
27. ***Shanti Kumar Panda*** v. ***Shakuntla Devi,*** (2004) 1 SCC 438: 2004 SCC (Cri)
28. *Ibid.*

It has been held that a decision of the civil court will be no consequence to the proceedings initiated under Sections 145 and 146.[29] They operate at different levels.[30]

The Supreme Court has laid down that if a civil proceeding is pending no criminal court should initiate proceedings under Section 145. It has been pointed out that multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation.[31]

The existence of disputes mentioned in Sections 145 and 146 is determinative of the invocation of the Magistrate's power for making preliminary and attachment order.[32] In other words, if there was no dispute or if the dispute has been resolved by the civil court no order could be made under Section 146.

Composite order can be made.—The court can order a composite order of attachment of disputed property under Section 146(1) while passing the preliminary order under Section 145(1) provided the following circumstances obtained:

(a) The order under Section 145(1) would be separately drawn than the order under Section 146(1)

{b) That the order under Section 145(1) must precede order under Section 146(1)

(c) It must be borne out from both the orders that they satisfy separately the existence of the conditions for drawing such orders under the two sections.[33]

When the Magistrate attaches the subject of dispute, the property becomes *custodia legis* and, therefore, provision has been made in Section 146 of the Code that the Magistrate may, after he has attached the property, make such arrangement as is necessary and proper for looking after the property or if he thinks fit to appoint a receiver thereof.[34] If a receiver is subsequently appointed by him to hand over the property to the receiver appointed by any civil court, the Magistrate shall order the receiver appointed by him to hand over the property to the receiver appointed by the civil court, and may then make such incidental and consequential orders as would be considered just and proper.

29. Shisbn v. ***State of***
30. *Brajamohan Nath v. Kesi*
31. ***Ram Sumer Puri Mahant*** v. ***State ofU.P.,***
32. *Ra*m *Krishan Dass* v. *Rameshwar Dass,* 1988 Cri LJ 291 (
33. *AsgaraliShab* v. *State of*
34. *Mohd. Muslehuddin* v.

An order of attachment under Section 146(1) and appointment of a receiver in respect of the subject of dispute is an order of moment and it substantially and directly affects the rights of the parties; therefore such an order cannot be considered as an interlocutory order, and a revision petition against such an order can be entertained.[55]

It has been made clear by the Allahabad High Court that the powers under Sections 145, 146 etc. if exercised improperly by the Magistrate they could be corrected by way of revision to the Sessions Court. And again, these orders could be challenged by invoking Section 482 in the High Court.[35 36]

28.28

Preventive measures in respect of disputes concerning right of use of land or water

Section 147 provides as follows:

Dispute concerning right of use of land or water

147. (1) Whenever an Executive Magistrate is satisfied from the report of a police officer or upon other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water within his local jurisdiction, whether such right be claimed as an easement or otherwise, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a specified date and time and to put in written statements of their respective claims.

Explanation.—The expression "land or w'ater" has the meaning given to it in sub-section *{%)* of Section 145.

(2} The Magistrate shall then peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and, if possible, decide whether such right exists; and the provisions of Section 145 shall, so far as may be, apply in the case of such inquiry.

(3) If it appears to such Magistrate that such rights exist, he may make an order prohibiting any interference with the exercise of such right, including, in a proper case, an order for the removal of any obstruction in the exercise of any such right:

Provided that no such order shall be made where the right is exercisable at ail times of the year, unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the [35 36]

35. ***Rupa Jena*** v. ***Tapai Swain,*** 1983 Cr£ LJ 1331, 1334 (Ori); see also, *Abd ul Jabb ar Kha*

36. *Ramesb Chandra Saxena* v. *Addl. S.J., Aligarh,* 199[n] Cri LJ 3794-

right has been exercised during the last of such seasons or on the last of such occasions before such receipt.

{4) When in any proceedings commenced under sub-section (i) of Section 145 the Magistrate finds that the dispute is as regards an alleged right of user of land or water, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1);

and when in any proceedings commenced under sub-section (1) the Magistrate finds that the dispute should be dealt with under Section 145, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1} of Section 145.

Disputes concerning the rights of user of land or water are potentially as dangerous as those relating to the possession of land or water. And as such disputes are fraught with danger to public peace, the Code by Section 147 provides preventive measures for their control.

Though the land belongs to one party and as such that party is having the right to possess the same, the court can still declare the right of user of the land in a particular manner by another party on satisfactory proof of such user.[37] [38] [39]

The procedure at the inquiry in such cases is the same as that provided by Section 145. Therefore the points applicable in respect of cases under Section 145 are *mutatis mutandis* applicable in respect of Section 147.

It may be noted that an order under Section 147 is without jurisdiction if it is made in the absence of any finding required by proviso to Section 147(3) that the right of user was exercised within three months of the receipt of information or police report in cases of rights exercisable at all times of the year or was exercised at the last particular occasion or season in case of periodically recurring rights.[38] [39]

It has been held that the Magistrate has power to pass interim orders under Section i47-[3']

It may be noted that according to Section 354(6), every final order made under Section 147 is required to contain the point or points for determination, the decision thereon and the reasons for the decision.

28.29 Provision for local inquiry

In this connection Section 148 provides as follows:

Local inquiry

148. (1) Whenever a local inquiry is necessary for the purposes of Section 145, Section 146, or Section 147, a District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may

37. *Ghana Bhoi* v.
38.

Bis

39.

furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2.) The report of the person so deputed may be read as evidence in the case.

{3} When any costs have been incurred by any party to a proceeding under Section 145, Section 146 or Section 147, the Magistrate passing a decision may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion and such costs may include any expenses incurred in respect of witnesses and of pleaders' fees, which the Court may consider reasonable.

It has been classified that Section 148 only enables the District Magistrates or SDMs to depute a Magistrate for inquiry. In fact there is no right for the parties to insist for an inquiry.[40]

Irregularities which vitiate proceedings under this chapter **28.30**

If any Magistrate, not being empowered by law in this behalf, does any of the following things:

(/) demands security to keep the peace;

(ii) demands security for good behaviour;

(iii) discharges a person lawfully bound to be of good behaviour;

(iv) cancels a bound to keep the peace;

(v) makes an order under Section 133 as to a local nuisance;

(;vi) prohibits, under Section 143, the repetition or continuance of a public nuisance;

(ini) makes an order under Section 144 or under Sections 145 to 148, his proceedings shall be void, *[see,* clauses *(c), (d),* (e}, *(f),* (/), *(i)* and (/), S. 461]

40. *Soorajmal* v. *State of Rajasthan,* 1998 Cri Lj 1515 (Raj).

Chapter 29

Proceedings for Maintenance of Wives, Children and Parents

29. Objects and scope of the chapter

Sections 125 to 128 provide for a speedy, effective, and rather inexpensive remedy against persons who neglect or refuse to maintain their dependant wives, children and parents. Though the subject-matter of these provisions is civil in nature, the primary justification for their inclusion in the Criminal Procedure Code, 1973 (CrPC) is that a remedy more speedy and economical than that available in civil courts is provided for by these sections for the benefit of needy persons mentioned therein. It may also be said that these provisions are aimed at preventing starvation and vagrancy leading to the commission of crime.[1] By providing a simple, speedy but limited relief, the provisions seek to ensure that the neglected wife, children and parents are not left beggared and destituted on the scrap heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence.[2]

The provisions contained in Sections 125 to 128 are applicable to all persons belonging to all religions and have no relationship with the personal law of the parties.[3] It may also be noted that as the exercise of

1. ***See,*** 41st Report, p. 303, para. 36.1. ***See also,*** observations of the Supreme Court in ***Bhagwan Dutt*** v. ***Kamla Devi,*** {1975) 2 SCC 386'. 1975 SCC (Cri) 563, 567: 1975 Cri Lj 40; ***S. Sethurathinam Piliai*** v. ***Barbara.*** {1971) 3 SCC 923: 1972 SCC (Cri} 171, 172; ***Y. Narayana*** v. Y. ***Kondatah,*** 1976 Cri LJ 1240,
2. ***Bhagtvan Dutt*** v. ***Kamla Devi,*** (1975) 2 SCC 386: 1975 SCC (Cri) 563, 567: 1975 Cri
3. ***Na?iak Chandra*** v. ***Chandra Ktshore Aggarwal,*** (1969) 3 SCC 802: 1970 SCC (Cri) 127, 129-30: 1970 Cri LJ 522.

the powers to grant maintenance is of a judicial character, only judicial Magistrates of the First Class have been empowered to deal with such matters of maintenance. Sections 12.5 to 128 prescribe a self-contained speedy procedure for compelling a man to maintain his wife, children and parents. Though the relief given under this chapter is essentially of a civil nature, the findings of the Magistrate are not final and the parties can legitimately agitate their rights in a civil court even after the order of the Magistrate.[4 5]

Consequent upon the reaffirmation of this view by the Supreme Court in *Mobd. Ahmed Khan* v. *Shah Bano Begum*,* Parliament enacted the Muslim Women (Protection of Rights on Divorce} Act, 1986. The divorced Muslim wife's claims can now be determined under this Act. It is however possible for the Muslim spouses to opt to be governed by Sections 125 to 128 of the Code by virtue of a provision in the present Act.

Some High Courts have taken the view that the abovesaid Act does not take away the Muslim wife's right to maintenance under Section 125 of the Code.[6]

The Supreme Court has now clarified that the Muslim Women (Protection of Rights on Divorce) Act, 1986 requires the Muslim husband to make provision for the future maintenance of the divorced Muslim wife. The court ruled in *Danial Latifi* v. *Union of India*[7] thus:

> A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period by terms of Section 3(i)(tf} of the Act.[8]

As regards the validity of orders passed under the provisions in the CrPC after the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 the Orissa High Court[9] and the Bombay High Court[10] have opined that in the absence of a provision in the Act of 1986 prohibiting the enforceability of the order, such order granting maintenance to [4 5 6 7 8 9 10]

4. ***Nand Lai Misra*** v. ***Kanbaiya Lai Misra,*** i960 Cri LJ 1246, 1249: AIR i960 SC 882.
5. {1985} 2 SCC 556: 1985 SCC (Cri) 245: 1985 Cri Lj 875.
6. See, for example *Ali* v. *Sufaira,* (1988) 2 KLT 94; *Arab Ahemadhia Abdulla* v. *Arab Bail Mohmuna Saiyadbhai,* AIR 1988 Guj 141; *Abdul Kkader* v. *Razia Begum,* 1991 Cri Lj 247 (Kara); *Hazi Abdul Khaleque* v. *Samsun Nehar,* 1991 Cri LJ 1843 (Gau); also see, *WSk. Nasiruddin* v. *Dulari Bibi,* 1991 Cri LJ 2039 (Ori); *Mumtazben jusabbbai Sipahi* v. *Mahebubkhan Usmankhan,* 1999 Cri LJ 888 (Guj); but see also, *Abdul Gafoor Kunju* v. *Pathumma Beevi,* {1989) r KLT 337; *Hazran* v, *Abdul Rehman,* 1989 Cri LJ 1519 (P&H); ALA. *Hameed* v. *Arif Jan,* 1990 Cri LJ 96 (AP); *Qazi Mohammed Hanifv. Mumtaz Begum,* 1990 Cri Lj 171 (Bom); *Usman Khan Bahamani* v. *Fathimunnisa Begum,* 1990 Cri LJ 1364 (FB) (AP); *Abdul Rashid* v.
7. (2001) 7 SCC 740: (2007) 3 SCC (Cri) 266.
8. ***Ibid,*** 765 (SCC).
9. *Shamshad Begum v. Mohd. Noor Ahemad Khan,* 2001 Cri LJ 2396 (Ori).
10. ***Kamal Uddin*** v. ***Raisa Begum,*** 2001 Cri LJ 4410 (Bom).

the divorced Muslim woman would be operative. The Supreme Court has also ruled that the Magistrate retains jurisdiction under Section 125 even after the enactment of the 1986 Act.[n]

The succeeding paragraphs of this chapter consider the persons who are entitled to claim maintenance, the circumstances in which the maintenance is awardable, the jurisdiction of the Magistrates to entertain petitions for maintenance, the procedure to be followed in the proceeding before the Magistrates, the quantum of the allowance in the proceeding before the Magistrates, the quantum of the allowance and the mode of its payment, procedure for the enforcement of maintenance orders, and the alteration or cancellation of such orders due to changed circumstances.

29.2

Order for maintenance of wives, children and parents

The main provision regarding grant of maintenance
This is contained in Section 125 which runs as follows:

125. (r) If any person having sufficient means neglects or refuses to maintain— *(a)* his wife, unable to maintain herself, or

lb) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate [11] [12] [13][* * *], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause *(b)* to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

[A][Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under the sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.]

Explanation.—For the purposes of this Chapter,— [11] [12] [13]

11. *Kbatoon Nisa* v. *State ofU.P.*, Civil Appeal No. 4789 of 1994, decided on
12. The words "not exceeding five hundred rupees in the whole" *omitted* by Act 50 of zoor, S. *2{i){a}.*
13. *Ins.* by Act 50 of 2001, S. 2

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[H][(z} Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [14] [15] [16] [17] [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refused to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an [A][allowance for the maintenance or the interim maintenance and expenses of proceeding as the case may be,] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

{5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

29.3 Persons entitled to claim maintenance

Under the circumstances mentioned in para. 29.4, a person is required by Section 125(1) to pay maintenance to the following persons:

(a) His wife: The term "wife" appearing in Section 125(1) means only a legally wedded wife.[14] [15] [16] [17] In the absence of a legal and valid marriage, the

14. *Subs,* by Act 50 of 2001, S. *z(ii).*

15. *Subs,* for "allowance" by Act 50 of 2001, S. *2{Hi).*

16. *Ibid.*

17. See, *Savitaben Somabhai Bbatiya* v. *State of Gujarat,*

mere fact that the parties had lived together as husband and wife to the knowledge of the public or otherwise could not confer on the woman status of a "wife". The fact of the parties having lived together as husband and wife for a long time would be relevant to raise only a presumption in law of their being husband and wife.[ls] However such a presumption is rebuttable on the proof of the invalidity of the marriage. The consideration of the other provisions of Section 125 would strengthen the above view. *Firstly,* the section while specifically providing for both legitimate and illegitimate children, it restricts the Magistrate's power to make an order for maintenance in favour of "wife" only and does not extend it in favour of any other woman though not legally and validly married but living "as wife". *Secondly,* Explanation *(b)* to Section 125(1} expressly includes in the term "wife" also a divorced woman. A divorced woman cannot exist unless initially she was a legally wedded wife. This specific inclusion of a divorced woman in the term "wife" would clearly show that the term "wife" would only mean legally wedded wife.[18] [19]

The Supreme Court affirmed this ruling on appeal saying that the legal validity of a marriage would be determined by the personal laws applicable to the parties.[20] It has been held by the Supreme Court that it is for the husband to prove that his first marriage was valid to sustain his plea that his second marriage was invalid.[21] In *Rajathi* v. C. *Ganesan*[22], the Supreme Court opined that it may be difficult in certain cases to prove the second marriage and therefore court need not look into the marriage laws for granting maintenance in cases where the husband is allegedly living with another "woman".

In yet another case the Supreme Court ruled that the finding of the court in a case under Section 494 IPC (bigamy) that the woman who was alleging to be the wife of the appellant had failed to establish her marriage with the appellant-husband or his alleged second marriage with another woman could result in the denial of her claim for maintenance.[22] [23]

The Supreme Court has had an occasion to deal with the plea of the husband that he was compelled to marry the woman without observing the usual rituals and therefore the woman was not his legally-wedded wife

(Cri) 7S7.

18. ***See,*** discussions in ***Anupama Pradban*** v. ***Sultan Pradhan,*** 1951 Cri LJ 32.16 (Ori).
19. ***Yamunabai*** v. ***Anantrao,*** 1983 Cri LJ 259, 264-6; (Bom) (FB); see also, ***Savilhramma*** v, ***Ramanarasimhaiab,*** (1963) 1 Cri LJ 151, 133 (Mys); ***Bansidbar*** v. ***Cbhabi Chatterjee,*** 1967 Cri Lj 1176, 1178: AIR 1967 Pat 277; ***Laksbmi Ambalam*** v. ***AndiammaL*** (1938) 39 Cri Lj 228: AIR 1938 Mad 66; ***Raman Pillai Vasudevan Nair*** v. ***Subbadra Amnia,*** 1989 Cri Lj 1274 (Ker).
20. *Yamunabai Anantrao Adbau* v. *Anantrao Shivram Adhau,* (1988) 1 SCC 530: 1988 SCC (Cri) 182: 1988 Cri Lj 793; **see**, discussions in ***Kumari Bat*** v. ***Anandram,*** 1998 Cri LJ 4100 (MP).
21. ***Vitnala {K.)*** v. ***Veeraswamy (K.},*** (1991) 2 SCC 375: 1991 SCC (Cri) 442.
22. (1999) 6 SCC 3261 1999 SCC (Cri) 1118: 1999 Cri Lj 3668.
23. ***Samir Mandal*** v. ***State of Bihar,*** (2001) 10 SCC 50: 2002 SCC (Cri) 1115.

for the purposes of granting maintenance. The court rejected his plea saying that the proceedings under Section 125 do not determine the status and that the remedy lies in civil court.[24] [25]

The Supreme Court's observations are illustrative:

> ...in our view from the evidence which is led if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under Section 125 CrPC which are of a summary nature, strict proof of performance of essential rites is not required. Either of the parties aggrieved by the order of maintenance under Section 125 CrPC can approach the civil court for declaration of status as the order passed under Section 125 does not finally determine the rights and obligations of parties.

A marriage solemnised by exchange of garlands was held invalid.[26]

In some cases it has been held that a strict proof of legal marriage is not necessary and that the parties were living together as husband and wife would be sufficient for the woman to claim maintenance under Section 125.[27]

[29] [30] This view seems to be preferable inasmuch as the purpose of granting maintenance is prevention of destitution. This gets support from the Supreme Court decision in *Rameshchandra Rampratapji Daga* v. *Ramesbwari Rameshchandra Daga*[11]. In this case after the second marriage {celebrated without getting a decree of divorce from the first marriage) the parties lived as husband and wife for a long period. In such a situation, the granting of maintenance to the wife under Section 25, Hindu Marriage Act, 1955 dehors the invalidity of the second marriage was upheld by the Supreme Court. The reasoning seems to be relevant to cases under Section 125 of the Code.

It is interesting to note the development of a new approach to granting maintenance in the context of Prevention of Domestic Violence Act, 2005. The Supreme Court in *D. Velusamy* v. D. *RatchaiammaF*[9] ruled that a woman who was in a marriage-like relationship, though not a legally- wedded wife under Section 125 could claim maintenance under the protection against Domestic Violence Act.

In *Cbanmnniya* v. *Virendra Kumar Singh Kushwaha*[30] the court examined its precedents regarding acceptance of marriage-like relationship and the conflicting opinion in *Yamunabai Anantrao Adhav* v. *Anantrao* [24] [25] [26] [27] * [29] [30]

24. *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit,* (1999) 7 SCO

25. ***Ibid,*** 682.

26. ***Naresb Chandra*** v. ***Reshma Bai,*** 1992 Cri Lj 579 (MP).

27. ***Sandamini Devi*** v. ***Bhagirathi Raj,*** 19S2 Cri LJ 539 (Ori); ***Boh Narayan Paw ye*** v. ***Siddheswan Morang,*** 1981 Cri Lj 674 (Gau); see aiso, ***Anupama Pradhan*** v. ***Sultan Pradhan,*** 1991

2S. *See,* the discussion in *Rameshchandra Rampratapji Daga* v. *Ramesbwari Rameshchandra*

29. (zoxoj 10 SCC 469: (201 r) 1 SCC (Cri) 59: 2011 Cri LJ

30. (2011) 1 SCC 141: (2011) 2 SCC (Cri) 666; ***zou*** Cri Lj 96.

Shivram Adhav[35] laying down that "wife" should be legally wedded, and referred the conflict to a larger Bench. However, the court decided that Prevention of Domestic Violence Act should be applicable to a woman seeking maintenance under Section 125. The court reasoned thus:

> 36, Further, Section 20 of the Act allows the Magistrate to direct the respondent to pay monetary relief to the aggrieved person, who is the harassed woman, for expenses incurred and losses suffered by her, which may include, but is not limited to, maintenance under Section 12.5 CrPC. [S. 2.0(1)(d)]
>
> 37. Section 22 of the Act confers upon the Magistrate, the power to award compensation to the aggrieved person, in addition to other reliefs granted under the Act. In terms of Section *z6* of the Act, these reliefs mentioned above can be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent. ...
>
> 39. *We* are thus of the opinion that if the abovementioned monetary relief and compensation can be awarded in cases of live-in relationship under the Act of 2.005, "hey should also be allowed in a proceeding under Section 12,5 CrPC. It seems to us that the same view is confirmed by Section 26 of the said Act, 2005."

The Supreme Court granted relief under the Act of 2005 even to a woman who left the matrimonial home on 4 July 2005 before the Act came into force on 26 October 2006.[31 32 33]

The wife may be of any age—minor or major. Although the Child Marriage Restraint Act, 1929 as amended by Act 2 of 1978 makes it punishable to contract a marriage with a minor girl *t.e.* a girl below 18 years of age, yet the validity of such a marriage is not affected by the contravention of the Child Marriage Restraint Act. Therefore even a minor wife being a legally wedded "wife" is entitled to claim maintenance under Section 125.

The Explanation *(b)* to Section 125(1) provides that for the purposes of this chapter "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. By this extended definition of "wife", the right to claim maintenance is made available also to a divorced wife. This was considered necessary in view of the peculiar personal laws applicable to some of the communities in India. According to these laws the husband can at any time divorce his wife at his will. The extension of the word "wife" to cover even a divorced wife is intended to prevent the unscrupulous husbands frustrating the legitimate maintenance claims of their wives by just divorcing them under the above- said personal laws. The Explanation *(b)* above is aimed at securing social justice to women in our [31 32 33 34]

31. (1988} r SCC 530: 1988 SCC (Cri) 182: 1988 Cri LJ
32. *Chanmuniya* v. *Viren dr a Kumar Singh Kushwaha,* (2011) 1 SCC 141: (2011) 2 SCC (Cri.) 666: 2011 Cri LJ
33. *V.D. Bhanot* v. *Savita Bhanoti* {2012) 3 SCC 183:
34. joint Committee Report, p. xiii.

Section 125 applies both to women who have been divorced before or after the new Code came into force. Under that section a present right has been conferred in relation to a past event and it will not make the section retrospective. Apart from that the section is both remedial and beneficial in character and in such circumstances it is the duty of the judge to construe it in such a manner as to suppress the mischief and advance the remedy. Therefore it has been held that, under Section 125(1), even a woman divorced before 1 April 1974 *(i.e.* the date of coming into force of this Code) could claim maintenance, provided the other conditions are satisfied.[31]

According to the principles of Mohammedan Law, a divorced wife has a right to claim maintenance from her husband only up to the expiry of the period of *iddat* and not beyond that period. However these principles were not held relevant while considering the provisions of Section 125. According to this view the meaning of the word "wife" as found in the Explanation to Section 125(1) indicated that a divorced Mohammedan woman could bring action under Section 125 claiming maintenance from her ex-husband so long as she did not marry even if the period falls beyond the period of *iddatd*[6] It was held that the Explanation *(b)* to Section 125(1) did not make any distinction between *khula* divorce and talaq divorce.[37] [38] In view of the Explanation, Muslim woman who had obtained a decree of divorce under the Dissolution of Muslim Marriages Act, 1939 could also claim maintenance under Section 125(1) [36].[35]

However, as explained earlier consequent upon the decision in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[39], Parliament enacted Muslim Women (Protection of Rights on Divorce) Act, 1986 making Muslim Law applicable in the case of divorced Muslim women. Still some High Courts hold the view that Sections 125 to 128 are applicable to Muslim women.[40] [41]

It is interesting to note that the Supreme Court has now extended this protection to the divorced Muslim women by ruling that provision including maintenance extending beyond the *iddat* period must be made by the husband within the *iddat* period by terms of Section 3(1)[A]) of the Act of 1986 **4**[1] **35** **3**[6] 37 3[8] 39 4[0] 4[1]

35. *K. Raza Khan* v, *Mumtaz Khatoon,* 1976 Cri L] 905, 907-08 (AP); *Mohd. Haneef w Anisa Khatoon, 1976* Cri Lj 52,0, 5x1 (All); *Mohd. Khan* v, *Mahrunnisa,* 1977 Cri LJ 9x3 {Kant}; *Tejinder Kam* v. *Balbir Singh,* 1978 Cri LJ 604,
36. *U.H. Khan* v. *Mababoobunnisa,* 1976 Cri LJ 395, 596 (Kant); *Khurshid Khan* v. *Husnabanu,* 1976 Cri LJ
37. *Khurshid Khan* v. *Husnabanu,* 1976 Cri LJ 1584, 1585
38. *Zohara Khatoon* v. *Mohd. Ibrahim,* (1981) x SCC 509: 1981 SCC (Cri) 517: 1981 Cri Lj **754**
39. (1985) x SCC 556: 1985 SCC (Cri) Z45: 1985 Cri IJ 875.
40. *See supra,* note 6.
41. *See supra,* note 7.

It has been held that a Muslim wife is entitled to maintenance under Section 125 till divorce by her husband is communicated to her.[42] In a case where the husband arguing that there was a divorce effected by him and his wife's case should be dealt with under the Muslim Women (Protection of Rights on Divorce) Act, 1986 the Calcutta High Court found that his plea for divorce was already rejected and it was not a changed circumstance as divorce plea was made after the maintenance order was made.[43] In yet another case the Madras High Court opined that valid dissolution of Muslim marriage requires that there should be an attempt of reconciliation between husband and wife by two mediators—one chosen by wife from her family and other chosen by husband from his side. Since there was no evidence of this procedure in the present case, the court ruled that there was no divorce and as such the Muslim wife was held entitled to maintenance.[44]

A wife who became a divorcee by mutual consent by executing a document would fall within the scope of the inclusive definition of "wife" given in Explanation *[b)* to Section i25(i}.[45] It has been ruled by the Kerala High Court that woman who surrendered all her rights on divorce prior to the enactment of the Code of 1973 could not surrender the right to get maintenance conferred on her by the Code of 1973.[46] The Bombay High Court has also opined that a divorce deed enabling the husband to avoid payment of maintenance cannot stand in the way of granting maintenance to the wife.[47]

The status of wife has to be seen on the date when the application under Section 125 is hied. If she retains that status the application is maintainable and if she loses that status, the application is not maintainable as on the date it is filed.[48]

{b} His legitimate or illegitimate child: If the child is minor it is immaterial whether it is married or not. For the purposes of this chapter, Explanation *(a* to Section 125(1) defines minor as meaning "a person who, under the provisions of the Indian Majority Act, 1875, is deemed not to have attained his majority". The child may be male or female. A minor married girl may be entitled to claim maintenance from her husband or

42. *hntiyaz Ahmad* v. *Shamim Bano,* 1998 Cri LJ 2343 (All).
43. *Omar Ali* v. *Aspia Bihi.* 1998 Cri Lj 752 (Cal).
44. *Saleem Basha* v. *Mumtaz Begam,* 1998 Cri LJ 4782 (Mad).
45. *Padmanahhan* v. *Bhargavi Sarojmi,* 1981 Cri LJ 826 (Ker); see also, *Valsata* v. *Surendran,* 1979 KLT 160; *K. Shanmukhan* v. G. *Sarojint,* 1981 Cri LJ 830, 833 (Ker); *Ra?ijit Kaur* v. *Pavittar Singh,* 1992 Cri Lj 262 (P&H); *Deba Prasad Patei* v. *Sabitarani Palei,* 1994 Cri LJ 1168 (Ori); *toydel Kumar Biswas* v. *Maduri Biswas,* 1994 Cri LJ 3342 (Cal); *Gurmit Kaur* v. *Surjit Singh,* (1996} 1 SCC 39;
46. *Ravindran Nair* v, *Sakunthala Amnia,* 1978 Cri Lj 1049
47. See, *Kaushalyabai Dinkar Mule v. Dinkar Mahadeorao.*
48. *Ramesh Chandra* v. *Beena Saxena,* 1982 Cri LJ 1426, 1428

her father (or may be from both) provided the other necessary conditions are satisfied. However, the proviso to Section 12,5(1) provides that if the husband of a minor married female child is not possessed of sufficient means the father of such female child will be required to make allowance for the maintenance of such female child until she attains her majority.

A Muslim father's obligation like that of a Hindu father, to maintain his minor children as contained in Section 125 is absolute and is not at all affected by Section 3(1)(£>), Muslim Women (Protection of Rights on Divorce) Act, *1986.*[49 50 5152]

(c) *His legitimate or illegitimate abnormal child who has attained majority:* Where such child is by reason of any physical or mental abnormality or injury unable to maintain itself. However a married daughter is not entitled to maintenance under Section 125 if she has attained majority. In such cases the responsibility of maintaining her is that of the husband and not of the father.

{d} His father or mother; It is not quite clear from the section whether "father or mother" will also mean "adoptive father or mother" or "stepfather or stepmother". According to Section 3(20}, General Clauses Act, 1897, the word "father" shall include an "adoptive father"; and though the term "mother" has not been similarly defined, it has been held that the term "mother" includes "adoptive mother".However, it has also been held that having regard to the object and intention of Section 125, the term "mother" will have to be given its natural meaning, and that it would not include a "step mother".[35] This view has since been reiterated by the Andhra Pradesh High Court.[32] The Supreme Court opined that a childless stepmother may claim maintenance from her stepson provided she is a widow or her husband, if living, is also incapable of maintaining her. If she has natural born sons and daughters and her husband is alive, she cannot claim maintenance from her stepson.[53] This decision was followed by the Karnataka High Court in *Ulleppa* v. *Gangabai*[54] despite the stepmother having a daughter by her first marriage, but the daughter was not in a position to maintain her. It is also feared that there might be considerable difficulty in the amount of maintenance awarded to parents [49 50 51 52 53 54]

49. *Noor Saba Khatoon* v. *Mohd. Qitxsim,* (1997) 6 SCC 2.33: 1997 SCC (Cri) 924: 1997 Cri LJ 3972; also see, G.M. *Jeelani v. Shanswar Kulsum,* 1994 Cri LJ 271; *Allabuksh Karim Shaikh* v. *Moorjaban Allabuksh,* 1994 Cri LJ 2826

50.*Bahan v. Parvsdbai,* 1978 Cri LJ 1436, 1440 (Bom).

51.*Ramabai* v. *Dinesh,* 1976 Mah LJ 565 (Bom); but see contra, *Hauaben* v, *Razakbhai,* 1977 Cri LR 381 (Guj);

52.*Ayyagari Suryanaravana Vara Prasad a Rao* v. *Ayyagari Venkatakrishna Veni,* 1989 Cri LJ 673 {Ap}.

53. *Kirtikant D. Vadodaria* v. *State of Gujarat,* (1996) 4 SCC

54. 2003 Cri LJ 2566 (Kant).

apportioning amongst the children in a summary proceeding of this typed[3] However it has been suggested that if there are two or more children, the parents may seek the remedy against any one or more of them.[55] [56] This suggestion found approval in *Mahendra Kumar* v. *Gulabai,* wherein the Bombay High Court ruled[57] that a mother could claim maintenance from either or both of her sons even when her husband is alive.

Though Section 125(1} does not specifically say so, it has been held by the Punjab and Haryana High Court that the liability to provide maintenance to the father or mother is that of the son and not of the daughter.[58] The High Court of Kerala has however taken a different view and has held that a daughter is also liable to maintain her parents who have no ostensible means of livelihood. The reasoning adopted by the Kerala High Court is as follows:

> The expressions used in Section 12,5 are 'any person', 'his father or mother' and 'such person'. These expressions are not defined in the Code. Section *z{y)* of the Code says:
>
> > Words and expressions used herein and not defined but defined in the Penal Code have the meanings respectively assigned to them in that Code.

So we have to refer to Penal Code, i860 (IPC). Section 8 IPC reads:

> 8. *Gender.*—The pronoun "he" and its derivatives are used for any person, whether male or female.

Therefore the expression "his father or mother" occurring in Section 12.5 must be taken to have the meaning "her father or mother".

According to the Kerala High Court, this view is supported by Section 13, General Clauses Act, 1897.[59]

The Kerala High Court's view has been affirmed by the Supreme Court.[60] The court pointed out that apart from any law, the Indian society casts a duty on the children to maintain the parents and this social obligation equally applies to daughter.[61]

In *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai*[62], it was held that the respondent was entitled to claim maintenance from the appellant, his married daughter, under Section i25(i}{<i) CrPC. The court observed that there can be no doubt that it is the moral obligation of a son or a daughter to maintain his or her parents. Apart from any law, the Indian society casts such a duty on the children. But, before ordering maintenance in [55] [56] [57] [58] [59] [60] [61] [62]

55. See, 41st Report, p. 304, para. 36.4.
56. joint Committee Report, p. xiv.
57. *Mabendrakumar* v. *Gulabbai,* 2001 Cri Lj zirr (Bom).
58. *Raj Kumari* v. *Yashoda Devi,* 1978 Cri Lj 600-01
59. *M. Areefa Beevi* v. *K.M. Sahib,* 1983 Cri LJ 412, 415-16
60. *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai,* (1987} 2 SCC 278: 1987 SCC (Cri) 354:
61. *Ibid.*
62. (1987} 2 SCC 278.

favour of a father or a mother against their married daughter, the court must be satisfied that the daughter has sufficient means of her own independently of the means or income of her husband, and that the father or the mother, as the case may be, is unable to maintain himself or herself.

It may be noted that Section 125(1} does not contemplate that the obligation to maintain an aged, infirm parent who is unable to maintain himself or herself can be enforced only if it is preceded by the fulfilment of the parental obligation to maintain and bring up the children during the childhood of the children.[63 64 65 66 67 68] If a father has more than one son he can seek maintenance from any one of them/[4]

29.4 Essential conditions for granting maintenance

In this connection, the analysis of Section 125 will bring out the following points:

(1} *The person from whom maintenance is claimed, must have sufficient means to maintain the person or persons claiming maintenance [see, S. 125(1*)].—The "means" contemplated in Section 125(1} are not confined only to visible means such as lands and other property or employment. If a person is healthy and able-bodied he must be held to have means to support his wife, children and parents/[5] The courts have gone to the extent of laying down that the husband may be insolvent or a professional beggar or a minor or a monk, but he must support his wife so long as he is able-bodied and can eke out his livelihood/[6]

(2) *Neglect or refusal to maintain.*—The person from whom maintenance is claimed must have neglected or refused to maintain the person or persons entitled to claim maintenance. Neglect or refusal to maintain may be by words or by conduct. It may be express or implied/[7] Burden of proving neglect is on the claimant/[8] Ordinarily "neglect or refusal" may mean something more than mere failure or omission. But where there is a duty to maintain, mere "failure of commission" may amount to neglect or refusal in the circumstances of the case. For example, mere failure to maintain a child who has no will or volition of its own is "neglect or refusal" to [63 64 65 66 67 68]

63. *Pandurang* v. *Baburao,* 19So Cri Lj 2.56, 258 (Bom).

64. *Hamsa* v. *Abdul Jaleel,* 1999 Cri Lj 2.2,17 (Ker); also see, *Mabendrakitmar* v. *Gtdabbai,* 2001 Cri Lj 2.111 (Bom).

65. *Kandasamy Chetty, re,* (1929} 27 Cri Lj 350, 351: AIR 1926 Mad 346; *Dbani Ram* v. *Ram Dei,* 1955 Cri Lj 768, 760: AIR 1955 A!! 3 20; *Kandasami Moopan* v. *Angammal,* 1960 Cri Lj 109 8: AIR i960 Mad 348; *Chander Parkash v. Shila Rani,* 1968 Cri LJ 1153, 1155: AIR 1968 Del 174; *Gh. Hassan* v. *Raja Bibi,* 1973 Cri LJ 1019 (j&K); see also, *Durga Singh Lodbi* v. *Prembai,*

66. *Basanta Kumari* v. *Sarat Kumar,* 1982 Cri LJ 485, 486 (Ori); see also, *Tarak Shaw v. Minto Shaw,* 1984 Cri Lj 206 (Cal).

67. *Bhikaji* v. *Maneckji,* (1907) 5 Cri Lj 334, 336 (Bom).

68. *See,* observations in *Dasaratbi Ghosh* v. *Anuradha Ghosh,* 1988 Cri LJ 64

maintain the child*[69] A husband who makes it difficult for the wife to live with him and who fails to maintain her when she lives elsewhere "neglects refuses" to maintain the wife. A husband cannot expect any self-respecting wife, in keeping with modern ideas, to share the conjugal home with a mistress or another wife. Thus the offer of a husband, who has taken a second wife, to maintain the first wife on condition of her living with him cannot be considered to be a bona fide offer and the husband will be considered to have neglected or refused to maintain the (first) wife.[70 71 72]

Even where the husband, by virtue of the personal law applicable to him, is entitled to marry a second wife while the first marriage subsists, the first wife may be justified in considering the second marriage itself a ground for living separately and seeking maintenance from the husband.[71 72]

The second proviso to Section 12.5(3) contemplated making "an order under this section". The use of the expression "section" and not "subsection" only emphasises that the proviso governs not only sub-section (3) but also sub-section (1), since even at the stage of passing maintenance order it is open to the husband to make an offer to maintain his wife on condition of her living with him. Under sub-section (1) the Magistrate has to be satisfied that the husband "neglects or refuses to maintain" his wife. In considering the same, the Magistrate has to apply his mind regarding the rights of the parties and he would be justified in considering whether the wife's refusal to live with her husband was based on just ground or not.[/2]

Where it is proved to the satisfaction of the court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental cruelty which would undoubtedly be a *just ground* as contemplated by the aforesaid proviso for wife's refusal to live with her husband and the wife would be entitled to maintenance from her husband according to his means.[73]

In view of the Explanation to the second proviso to Section 125(3), the very fact of the husband marrying another woman or keeping a mistress would entitle his wife to refuse to live with the husband and still

69. *Chand Begum* v, *Hyderbaig,* 1972 Cri LJ 1270, 1273 (AP).

70. *Ibid;* see also, *Jadab Chandra* v, *Kausalya,* 1975 Cri LJ 856, 858 (Ori); *Deochand* v.
State of Maharashtra. (1974) 4 SCC 610: 1974 SCO (Cri)
646: 1974 Cri LJ 1089; *Bhanwari Bai* v. *Bberoon Lai,* 1973

71.*Begum Subanu* v. *A.M. Abdul Gafoor,* (1987) 2 SCC 285: 1987 SCC (Cri) 300: 1987 Cri
LJ 980. *See also,* discussions in *Saygo Bai* v. *Chueeru*

72. *A.S.N. Nair* v. *Sulochana,* 1981 Cri LJ 1898, 1904-05 (Ker); see also, *Ghasitu* v. *Durga*
Devi. 1980 Cri LJ 885 (HP); *Banabibi* v. *Sikandarkban*

73. *Sirapnohmedkhan Jamnobamadkhan* v. *Hafizunnisa Yasinkhan,* (1981) 4 SCC 250:
19Si SCC (Cri) 829, 840: 1981 Cri LJ 1430; *Ash ok Kumar*

claim maintenance.[74] The aforesaid Explanation applies with full force in all cases where a husband has contracted marriage with another woman whether before or after his marriage with the woman who claims maintenance under Section 125. The intention of the legislature in enacting the explanation was to preserve the dignity of the woman whose husband is found living-with another woman. Therefore in such cases any. of the wives of the husband who has indulged in polygamy can refuse to live with him and claim maintenance and separate residence.[75]

It has been held that a wife who without sufficient reasons lives separately cannot claim maintenance.[76] But if the wife can show that the husband has another wife or mistress[77] or that she was physically tortured[78] [79] [80] or that she is already divorced entitling her to live separately,[79] [80] her claim for maintenance would not be denied on the ground of living separately.

If second, third or even fourth marriage is permissible under Mohammedan Law, a Mohammedan male may indulge in that luxury. At the most he may not be liable for offence of bigamy. However a Mohammedan wife would surely be entitled to live separately and claim maintenance solely on the ground that the very idea of contracting second marriage by her husband is abhorrent to her mind and therefore the second marriage by her husband causes her mental agony and cruelty. In such a situation husband cannot take shelter under his personal law and claim immunity from paying maintenance to his wife.[80] A wife would be entitled to the grant of separate maintenance on proof of the fact that her husband has taken another wife during the subsistence of their marriage unless, of course, the husband has alleged and proved that he has been providing such separate maintenance for her.[81]

Under the Mohammedan Law, a wife would not be entitled successfully to defend a suit for restitution of conjugal rights on the basis of a simple fact that the husband has another wife. Even if such a defence Is raised,

74. *G. Subhan Basha* v. *Shamshunntsa Begum,* 1980 Cri LJ 576, 377 (AP); see also, *Veeratina* v. *Sumitrabai,* 1991 Cri Lj 774 (Kanr); *Mustafa Shamsuddin Shaikh v. Sbamshad Begum,* 1991 Cri LJ 195a (Bom); *Gangabai* v. *Shnram,* 1991 Cri LJ 2,018 (MP); *Ansuiya Bat* v. *Nawas Lai,* 1991 Cri Lj 2559 (MP); *Dharmishthaben Hasmukhbhai* v.

75. *Ghasi tu* v. *D urga Devi,* 1980 Cri Lj 885, 888 (HP); *Hafijjabt* v. *Abdul Aziz Kadirkha,* 1983 Cri Lj 931, 932

76. *Manubai* v. *Sukhdeo,* 1990 Cri LJ 646 (MP).

77. *Begum Subanu* v. *A.M. Abdul Gafoor,* (1987) z SCC 285: 1987 SCC (Cri) 300: 1987 Cri Lj 980.

78. *Mithlesh Kumari* v. *Bindhawasani,* 1990 Cri LJ 830 (All).

79. *Molyabai* v. *Vishram Singh,* 1992 Cri Lj 69 (MP).

80. *Banabibi* v. *Sikandarkhan Umarkhan,* 1983 Cri Lj 1382, 1383 (Guj); see also, *Begum Subanu* v. A.M. *Abdul Gafoor,*

81. *Aziz Mobd. v, Sayda Begum,* 1981 Cri LJ 267 (J&K) (FB); see also, *Deochand* v. *State of Maharashtra,* (1974) 4 SCC

the suit will be decreed. But the matter is quite different when one has to consider the provisions of Section 125. The Explanation to Section 125(3) makes it abundantly clear that if the husband has contracted a marriage with another woman, that itself would be a just ground for his wife for refusal to live with him. Under these circumstances, the husband would not be entitled to resist the claim for maintenance under Section 125 simply because there is a decree for restitution of conjugal rights in his favour, even though ordinarily a decree for restitution of conjugal rights in favour of the husband would be a bar against the claim of maintenance by the wife.[82] A wife against whom an order of restitution of conjugal rights has been obtained by the husband is required to go back to him. If she does not, she loses the claim for maintenance on the ground of desertion. But if the husband obtains a decree of divorce, the wife cannot return to him and thus her claim for maintenance cannot be denied on the ground of desertion.[83]

If a husband makes an allegation of unchastity against his wife not only in the reply to the petition by the wife for maintenance but also in his statement on oath before the Magistrate, that would amount to cruelty to his wife and would be a sufficient reason for the wife to live separately and to claim maintenance.[84]

While it is true that the burden of proving refusal to live with the husband rests on the husband and the burden of proving sufficient reasons rests on the wife, when both sides adduce evidence and marshall circumstances before the court, the matter has to be decided on an appreciation of evidence and the circumstances and not merely on the basis of burden of proof.[85]

The term "maintenance" means *proper* maintenance and it should not be narrowly interpreted.[86] It has been laid down by the legislation that under Section 127(3)o maintenance should mean, maintenance or interim maintenance.[87]

The Full Bench of the Punjab and Haryana High Court considered the question whether the minors are entitled to claim maintenance from their father even if they are in custody of the mother who is living separate. Having regard to the provisions of Section 125, the court summarised the position of law on the above question as follows:

B2. *Hafijjabi* v. *Abdul Aziz Kadirkha,* 1985 Cri Lj 951, 933-34 (Bom); see also, *Ksmadi Bhavani* v. *Kamadi Lakshmanaswamy,* 1994 Cri LJ 1827 (AP).

83. *Madhusudan Mishra* v. *State of V. f* 198S Cri LJ 1247 {Ail}.

84. *Shakuntla* v. *Rattan Lai,* 1981 Cri LJ 1420, 1421 (HP).

85. *A.S.N. Nairv. Sulocbana,* 1981 Cri LJ 1898, 1905 (Ker).

86. *Burnasasbi Devi* v. *Nagendra Nath,* AIR 1950 Cal 465, 466; *Ramanlal* v. *Sbantaben,* 1968 Cri Lj 1073, 1974: AIR 1968 Guj 171.

87. *See,* the Criminal Procedure Code (Amendment) Act, 2001 (50 of 2001) published in Gazette of India, Extra. Part II, S. 1.

(i) If the child is living with the mother who is its natural guardian, the father is bound to maintain it and it is not open to him to impose a condition that the child must live with him.

(») Even in a case where the father is the natural guardian, but the child is in the custody of the mother, father's obligation to maintain the child subsists and he cannot impose a condition requiring the child to come and live with him in case the child has not attained the age of discretion or is not living with the mother of its free will or volition. *[Hi)* In such a case, in order to escape his liability to pay maintenance allowance, the father must obtain the custody of the child from the proper court, but till the custody is obtained, the child must be maintained wherever it is.

(iv) Father's liability to maintain the child does not cease merely because the child has attained the age of discretion but is living with the mother on account of natural love and affection or attachment with her. Till the father gets the custody of the child, it can successfully claim maintenance.[88]

It was observed by the court:

> In the case of wife, the husband can show that her refusal to live with him was unjustified and can thereby get rid of his liability to maintain her. In the case of a child, however, no such course is open to the father. The Legislature must have been aware of the impracticability of forcing the child to live with the father if the mother was living separately and that is why the husband was only granted the right, to make an offer to maintain to the wife, and not to the child. The only natural inference of this would be that it was intended that the child be maintained wherever it is, as in a large number of cases, it may not be possible for the child to comply with the desire of the father to come and live with him.[89]

The father's very insistence in the proceedings under Section 125 that the child should go back to him is sufficient to constitute neglect or refusal for the purpose of Section 125 of the Code.[90]

(3) *The person claiming maintenance must he unable to maintain himself or herself.*—This provision contained in Section 125(1) appears to be quite reasonable. Having regard to the object behind the provisions contained in Sections 125 to 128, which is mainly to prevent vagrancy, there is no need to compel a person to pay maintenance to another who is possessed of sufficient means.[91] Therefore under Section iz5(i)(a)

88. *Baibir Singh* v. *Hardeep Singh,* 1976 Cri LJ 1136, 1141-42. (P&H) (FB); see also, *Mohd. Yusuf Khan* v. *Zarina,* 1975 Cri LJ 1988, 1990-1991 (Raj); C. *Padmamma* v. C. *Narsi*
89. *Baibir Singh* v, *Hardeep Singh,* 1976 Cri LJ 1136, 1141-4Z
90. C. *Padmamma* v. C. *Narsi Reddy,* 1972, Cri LJ 1647 (AP).
91. See, Joint Committee Report, p. xiii.

maintenance allowance cannot be granted to every wife who is neglected by her husband or whose husband refuses to maintain her, but can be granted only if the wife is unable to maintain herself.[92] Wife need not specifically plead that she is unable to maintain herself.[93] However, in a case where the wife is hale and healthy and is adequately educated to earn for herself but refuses to earn and claims maintenance from her husband, it has been held that she is entitled to claim maintenance but that her refusal to earn under the circumstances would disentitle her to get full amount of maintenance.[94] The words "unable to maintain" only connote absence of means or source to maintain herself. They have nothing to do with her potential earning capacity.[95]

By the phrase "unable to maintain herself', it is not meant that she should be absolute destitute and should first be on the street, should beg and be in tattered clothes and then only she will be entitled to move an application under Section 12,5. A woman, no doubt, has to depend on some of her maternal relations for her maintenance when she leaves her husband's house. She can be maintained for some time by her relations. But that alone will not be sufficient, what is necessary is that she herself should be in a position to maintain herself and that it should not be much below the status which she was used to at the place of her husband.[96]

Where the wife claims maintenance under Section 125, it has been held, she should positively aver in her petition that she is unable to maintain herself in addition to the facts that her husband has sufficient means to maintain her and that he has neglected to maintain her.[97] [98] [99] However, if she fails to mention in her petition about her inability to maintain herself, the petition cannot be thrown out; and the court will have to decide this question having regard to the circumstances of each case on the material placed before it by both the parties.[98] [99] It has been classified that the claim for maintenance cannot be decided on the basis of affidavits filed by the wife."

92. *Manmohan Singh* **v.** *Mahindra Kaur,* **1976 Cri Lj 1664 (All); see also.** *Attar Singh* **v.** *Amit Singh,* **1982. Cri LJ** *211* **(Del);** *K.M.*

93. *Malan* v. *Baburao Yeshwant Jadhav,* 1981 Cri LJ 184 (Kant); *Udaivir Singh* v. *Vinod Kumari,* 1985 Cri LJ 1923 (All).

94. *Abdulmunaf* v. *Salima,* 1979 Cri LJ 172 (Kant).

95. *Vimal* v. *Sukumar Anna,* 1981 Cri LJ 210, 216 (Bom).

96. *Abul Salim* v. *Nafima Begum,* 1980 Cri LJ 232, 233 (All); see also, *Laksbyapati Badhan* v. *Udian Badhanen,* 1982 Cri LJ 1953, 1954 (Ori)i *Rewati Bat* v. *Jayeshwar,* 1991 Cri LJ 40 (MP).

97. *Zubedabi* v. *Abdul Khader,* 1978 Cri LJ 1555 (Kant); see also, *Haunsabai* v.

98. *Banshi Lai* v. *Magni Bat,* 1983 Cri LJ (NOC) 75 (Raj); see also, *Malan* v. *Baburao Yeshwant Jadhav,* 1981 Cri Lj 184 (Kant); *Raibari* v. *Mangaraj,* 1983 Cri Lj 125 (Ori); *Aijaz Ahmad* v. *Sbahjehan Begum,* 1982 Cri LJ 1022 (All); *Udaivir Singh* v. *Vinod*

99. *Shankar Gohane* **v.** *Kalpatia Gohane,* **1998 Cri LJ 4455 (Bom).**

In *Dukbtar Jahan* v. *Mohd. Farooq*[1], the High Court had quashed an order of maintenance passed in favour of a minor child by the Magistrate under Section 125 CrPC in exercise of its powers under Section 482 CrPC. It, however, deemed it fit to grant a certificate to prefer an appeal to the Supreme Court for consideration of a question of law as to whether in an application under Section 482 CrPC the High Court can interfere with concurrent findings rendered by the courts below. Instead of answering the question, the court observed that the proper course for the High Court, even if entitled to interfere with the concurrent findings of the courts below in exercise of its powers under Section 482 CrPC, should have been to sustain the order of maintenance and direct the respondent to seek an appropriate declaration in the Civil Court, after a full-fledged trial, that the child was not born to him and as such he is not legally liable to maintain it. Proceedings under Section 125 CrPC, it reminded, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner.

(4) *Special provision for maintenance of minor married girl.*—A minor married girl unable to maintain herself can claim maintenance from her husband if he, having sufficient means, neglects to maintain her. [see, S. i25(r)(iat)3 However, if the husband is not having sufficient means to maintain her, it has been provided, with a view to meet such a hard case, that she can claim maintenance from her father if he has sufficient means to maintain her. According to the proviso to Section 125 (1) the father, in such a case, can be required to make a reasonable allowance to her till she attains her majority.

(5) *When the maintenance is claimed by wife from her husband, (i) she must not be living in adultery.*—The words "living in adultery" in Section 125(4) have been almost uniformly interpreted as indicating an adulterous course of life as distinguished from a single lapse of virtue.[1 2] A *single* act of adultery would not be enough to disentitle the wife to maintenance. Because, hardships are bound to arise if the wife is totally debarred from the remedy under Section 125 due to a single lapse from virtue. Further, while making this provision it must have been thought that, to deprive her of maintenance for an occasional lapse might force her to lead a sinful life and would give her no chance to redeem herself.[3] The words "living in adultery" have now been consistently held to mean

1. (1987) 1 SCC 62.4.
2. *Tbanikchalam* v. *Dhakshyani,* 1966 Cri Lj 221, 222 {Mad); *Kista Pillai* v. *Amirthammal,* (1938) 39 Cri LJ 951, 952: AIR 1938 Mad 833; *Kanniappan* v. *Akilandammal,* 1954 Cri LJ 516, 517: AIR 1954 Mad 427; *Gopaiadeo* v. *Ratni,* (1929) 30 Cri LJ 403, 404: AIR 1929 Nag 23S; *Pidchand Maganlal, re,*
3. *See,* 41st Report, p. 305, para. 36.8.

an outright adulterous conduct where the wife lives in a quasi-permanent union with the man with whom she is committing adultery.[4 5] It would be wrong to consider mere friendship as amounting to adultery within the meaning of Section 125(4)7

When the husband challenges the claim for maintenance of his wife alleging that the wife is living in adultery, the husband ought to begin the case and prove the allegation of such adulterous life on the part of the wife by letting in evidence of her continued adulterous conduct at or about the time of application and then the wife against whom such a charge is made ought to be given an opportunity to rebut such allegation.[6]

In a case though the husband got divorce on the ground of adultery, since it could not be proved under Section 41, Evidence Act in a proceeding under Section 125 the husband's refusal to give maintenance on the ground of wife's adulterous conduct was not sustained.[7]

(ii) She must not refuse, without just ground, to live with her husband.—It has however been provided by the Explanation to the second proviso to Section 125(3) that 'hf a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him".

The husband contracting a second marriage is in itself a just ground for the wife's refusal to live with him as provided under Section 125(3). A point arises whether this can be considered to be a just ground only at the stage of Section 125(3) or even at the stage of Section 125(1), Subsection (4} of Section 125 governs the case under Section 125(1) also. This sub-section (4) only provides that she would not be entitled to any maintenance if she refused to live with her husband without any sufficient reason. The ground which is a just ground for refusal to live with him under Section 125(3) can certainly be considered to be sufficient reason for the purpose of Section 125(4) of the Code,[8] and consequently for the purpose of Section 125(1).

When the husband denies the parentage of the child he indirectly refers to the unchastity of wife. The accusation of adultery is sufficient cause for refusal on the part of the wife to reside with the husband.[9]

4. *Kasthuri* v. *Ramasamy,* 1979 Cri LJ 741, 745 (Mad).
5. *Mehbubabi v. Nasir Farids* 1977 Cri LJ 391, 393 (Bom).
6. 5.5. *Manickam* v. *Arputba Bhavani Rajam,* 1980 Cri Lj 354, 361 (Mad).
7. *Raja Rao* v. T. *Neelamma,* 1990 Cri Lj 2430 (AP).
8. *Savitri Devi* v. *Jagdtsb Narain,* 1976 Cri LJ 513 (All); see also, *Mohd. Ayyub* v. *Zaibul Nissa,* 1974 Cri Lj 1237,1238 (All); *Mithu Deviv. Siya Cbaudbary,* 1975 Cri Lj 1694, 1695 (Pat); however *see* contra, *Iqbalunnisa Begum* v. *Habib Pasha,* (1961) 2 Cri LJ 604: AIR 1961 AP 445. 446; *Rupcband Mahato* v. *Cbarubala,* 1966 Cri Lj 143: AIR 1966 Cal 83, 84; *Dhart Kaur* v. *Niranjan Singh,* 1960 Cri Lj 1494: AIR 1960 Punj 595, 598. *See,* discussions in *Saygo Bai* v. *Chueeru Bajra?tgi,* (2010) 13 SCC 762: (2011) 2 SCC (Cri) 415.
9. *Mango* v. *Mangtu,* 1976 Cri LJ 93, 94 (HP).

The decision in a suit against the wife for restitution of conjugal rights is equivalent to a decision by a competent civil court that the wife had no sufficient reason for refusing to live with her husband and the criminal court cannot inquire into any allegations of failure or neglect to maintain prior to such decision.[10]

What could be considered as a sufficient reason for the wife's refusal to live with her husband would depend upon the facts and circumstances in each case.

These points have been already discussed earlier in greater detail in the beginning of para. 29.4 under the head "(2.) Neglect or refusal to maintain." That discussion can be appropriately referred to here and the same has not been repeated all over again.

(Hi) She must not be living separately by mutual consent [S. 125(4)].—Clauses (4) and (5) of Section 125 do not apply to a divorcee- wife because the conditions contemplated therein cannot apply to her but can apply only to a wife whose marriage is still subsisting.[11]

A divorced wife cannot be characterised as a wife living separately by mutual consent. She is a person who lives separately from her former husband by virtue of a change in status consequent upon the dissolution of the marriage.[12] It has also been held that in the case of divorce by mutual consent if the wife had relinquished her right to maintenance she cannot later claim maintenance.[13][14][15]

A clear and categorical finding, if given by the competent civil court, cannot be overlooked or ignored or disregarded by the criminal court.[14][15] However, it has been held that merely because the civil court comes to hold while directing divorce that the wife is not entitled to maintenance, it would not deprive her of her right to claim maintenance in a criminal court though the criminal court is required to consider the civil court's decision.Another High Court held that the civil court's finding on a fact on which interim maintenance was rejected by it was not binding on the

10. *Mohd. Siddiq* v. *Zubeda Khatoon,* AIR 1952, All 616(2); *Geeta Kumari v. Shiva Cbaran,* 1975 Cri

11. *Manyumma* v. *Mohd. Ibrahim,* AIR 1978 Ker 231 (FB); see also, *K. Skanmukhan* v. G. *Sarojini,*

12. *Ravindran Nair v. Sakunthala Aram a,* 1978 Cri Lj 1049 (Ker); *Natvarlai Jektsandas* v. *Bai Girja,*
1983 Cri LJ (NOC) 42 (Guj); *Gurmit Singh* v, *Kashmir Kaur,* 1979 Cri Lj (NOC) 99 (P&H); *P, Valsala* v. *Sreedbaran Suren dr an,* 1979 KLT 160;

13. *Shraivan Sakbaram Ubbale v. Sau Durga Sbrawan Ubbale,* 1989 Cri Lj *211* (Bom); *see* contra,
Ravindran Nair v. *Sakuntbala Amma,* 1978 Cri LJ 1049 (Ker); also see,

14. *Harikishan* v. *Shantidevi,* 1989 Cri LJ 439 (Raj).

15. *Deba Prasad Palei* v. *Sabitarani Palei,* 1994 Cri Lj 1168 (Ori).

criminal court.[16] The fact that an applicant is entitled to seek the help of the civil court is no bar to invoke Section 125 for maintenance.[17 * 19]

29.5 Jurisdiction of Magistrates to deal with maintenance proceedings

(1) *Magistrates empowered to deal with such cases.*—As mentioned earlier in para. 29.1, only Judicial Magistrates of the First Class can deal with and decide petitions for maintenance under Sections 125 to 128. No other Magistrate has such jurisdiction. It has been provided by clause (g) of Section 461 that if any Magistrate, not being empowered by law in this behalf, makes an order for maintenance his proceedings shall be void.

(2) *Territorial jurisdiction.*—Proceedings for maintenance under Section 125 may be taken against any person in any district:

(a) where he is; or
(b) where he or his wife resides; or
(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child. [S. 12.6(1)]

However, wherever Family Courts have been established the jurisdiction to grant maintenance shall be exercised by the Family Courts under Section *7{2.){a}* of the Family Courts Act, 1984.

The alternative forums have been designedly given by Parliament so as to enable a discarded wife or helpless child to get the much-needed and urgent relief in one or the other of the three forums that is convenient to them.[ls]

Often a deserted wife is compelled to live with her relative far away from the place where the husband and -wife last resided together. For her convenience the venue of the proceeding has been made wide enough to include the place where she may be residing on the date of the application for maintenance.[13 19] These provisions appear to have been enacted only to meet the needs and convenience of the wife or child applying for maintenance. Where the applicant is the mother or the father it hardly makes any sense in providing the place of residence of the wife as the venue of the proceedings.

The proceedings under Section 125 are in the nature of civil proceedings, the remedy is a summary one and the person seeking the remedy is ordinarily a helpless person. So the words in Section 126(1) should be liberally construed without doing any violence to the language.[20]

16. *Ashok Nail? Singh* v. *Upasna Panwar,* 1994 Cri Lj 998 (HP).

17. *Chimata Nagarathnamma* v. *Chimaia Nathanaii,* 1991 Cri IS. *K. Mohan* v. *Balakanta Lakshmi,* 19S3 Cri LJ 13x6, 13iS

19.*See,* 41st Report, p. 306, para. 36.10.

20.*jagir Kaur* v. *Jaswant Singh,* {1963) 2 Cri LJ 415, 415: AIR

Since it is in the nature of civil proceedings it has been held that the court can invoke its inherent power for the restoration of a dismissed application for maintenance by the wife.[21]

A proceeding under Section 12.5 can be instituted in any competent court within the district in which the person proceeded against is, or where he or his wife resides or where he last resided with his wife.[22] Some High Courts have, however, interpreted Section 12.6(1) rather too strictly and have held that the proceedings should be instituted in a court which is not only within such district but also one having jurisdiction over the place where the person is or where he or his wife resides or where he last resided with his wife.[23] [24] [25] It appears that the wording of Section 12.6(1) does not seem to justify the addition of any further restriction and the former view seems to be more acceptable.[24] [25] This controversy however has lost much of its ground as the wife can now start proceedings in a court having jurisdiction over the place where she resides at the time of application. High Court in revision cannot interfere with positive finding in favour of marriage and percentage of children but where finding is negative, High Court would entertain revision, re-evaluate evidence since negative findings have evil consequences on life of both the child and woman.[21]

It has also been held that the father/mother can file applications under Section 125 in the court of the area where they reside.[26] They can also file petition at a place where their children reside.[27]

It may also be noted that according to Section 462, no order of the Magistrate shall be set aside merely on the ground that the proceedings in the course of which the order was passed, took place in the wrong district or other local area unless it appears that such error has in fact occasioned a failure of justice.[28]

The expression "resides" means something more than a flying visit and does not include a casual stay in a particular place, and what is required is an intention to stay for a period, the length of the period depending upon the circumstances of each case.[29] Similarly the expression "last resided"

21. *Sk. Alauddin v. Kbadiza Bibi,* 1991 Cri LJ 2.035 (Cal).
22. *Sbantabai* v. *Visbnupant,* (1965} 2 Cri Lj 73, 74: AIR 1965 Bom 107,108; *Balesbwari Devi* v.
Bikram Singh, 1968 Cri Lj 1296, 1297: AIR 1968 Pat 383, 384; *Balakrisbnan Nair* v. *Sulochana Amma,* {1962} 1 Cri L] 40, 41 (Ker); *Kumutham* v.
23.*Sbakuntala* v. *Tbirumalayya,* (1966) 2 MLJ 326, 327; *Abdul Qayyum* v, *Durdana Begum,* 1974 Cri
24.*See,* 41st Report, p. 306, para. 36.10.
25.See, *Pyla Mutyalamma* v, *Pyla Suri Demttdu,* (2011) 12 SCC 189: (2012} 1 SCC (Cri) 371: 2012 Cri
26. *Canga Sharan Varshney* v. *Sbakuntala Devi,* 1990 Cri LJ 128 (All).
27. *N.B. Bbikshu* v. *State of* A.P., 1993 Cri Lj 3280 (AP).
28. *Ambalal* v. *Dbiben Dahyabhai,* (1963) 1 Cri LJ 594, 595: AIR 1963 Guj 91.
29. *Jagir Kauy* v. *Jaswant Singh,* {1963) 2 Cri Lj 413, 415-16: AIR 1963 SC 1521; *Balakrishna Naidu v.*
Sakuntala Bai, (1943) 44 Cri Lj 741, 742-43: AIR 1942 Mad *666; Kbairunnissa*

must mean the place where the person had his last residence, whether permanent or temporary.[30]

The word "is" connotes in the context the presence or existence of the person in the district when the proceedings are taken. It is much wider than the word "resides". What matters is his physical presence at a particular point of time *i.e.* when the application is made.[31]

Procedure

29.6

The procedure to be followed by the Magistrate while conducting proceedings under Section 1x5 has been prescribed by sub-sections (2) and (3) of Section 126. These sub-sections are as given below:

> (2} All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons cases: Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.
>
> (3) The Court in dealing with applications under Section 125 shall have power to make such order as to costs as may be just.

Section 126(2} is mandatory in form and requires in dear terms that all evidence in such proceedings shall be taken in the presence of the person proceeded against or his pleader. The word "all" with which the subsection opens emphasises the fact that no evidence shall be taken in the absence of such person or his pleader.[32] In this connection it is worth quoting the observations of the Allahabad High Court when it said:

> Thus by insisting on the presence of the husband while the statements of the witnesses are being recorded, an opportunity is indirectly provided to the husband to patch up the differences and to effect a change of heart and restore a life of conjugal happiness by offering to maintain his wife. Not only that it is also possible to envisage a situation where by the

Asbrafunnisa, (1965) 2 Cri LJ 236, 237: AIR 1965 Pat 344; *K. Mohan* v. *Ralakanta Laksbmi,*
1983 Cri Lj 1316, 1319 (Mad); *Darshan Kumari* v. *Surinder Kumar,* 1995 Supp {4} SCC 137: 1996
SCC (Cri) 44.

30. *Jagir Kaur* v. *Jaswant Singh,* (1963} 2 Cri Lj 413, 416: AIR 1963 SC 1521; *Ranidei v.Jhunni Lai,*
(1926) 27 Cri LJ 820: AIR 1926 Oudh 268.

31. *Jagir Kaur* v. *Jaswant Singh,* (1963) 2 Cri LJ 413: AIR 1963 SC 1521; *Indubala Devi* v. *Saichit*
Prosad, (1939) 40 Cri LJ 598, 599: AIR 1939 Cal 333.

32. *Nand Lai Misra* v. *Kanbatya Lai Misra, i960* Cri LJ 1246, 1249: AIR i960 SC 882; *Naranappa* v.
Puttamma, (1062) 1 Cri LJ 787, 788: AIR 1062 Mys 174; *Venkatrao* v. *Rukminthai*

> of either parties in such proceedings, the husband and wife may by mutual consent agree to live separately. Section 488(1) [now Section 125(1)] is not a substantive offence and a break of the family is more often than not avoided by personal persuasion and rethinking rather than by remaining at long distance from each other. In my opinion these two opportunities of reconciliation and separation by consent were looming large in the minds of the Legislature when it insisted on the presence of the husband during the period evidence was taken on behalf of the applicant.[33]

It is only when for good reasons, the personal attendance is dispensed with that the presence of his pleader during the continuance of such proceedings can be deemed to be sufficient compliance with the requirements of Section 126(2) of the Code.[34]

The Magistrate may also proceed to hear and determine the case ex parte if he is satisfied that the husband is wilfully avoiding service or wilfully neglects to attend the court, but, otherwise all evidence in the proceedings must be taken down in the presence of the person proceeded against.[35] The proviso to Section 126(2) does not require that the Magistrate must first record reasons for his satisfaction before he decides to proceed ex parte in the matter. It is enough if such satisfaction *viz.* that the person is wilfully avoiding service or wilfully neglecting to attend the court is writ large on the record and reflected in the final order that is made.[36] In this connection, what amounts to "wilful negligence" on the part of such person in not attending the court is a question of law though it is to be decided on the basis of given facts. Wilful negligence cannot be inferred unless there was deliberate move to absent from court.[37] The service referred to above on the person proceeded against can be effected only in the manner prescribed by Section 62 for service of summons or in any other manner provided by Sections 63 to 67 of the Code.[38] Therefore notice sent by registered post or its publication in the newspapers is not proper service and the defect is not curable.[39]

An ex parte order passed under the proviso to Section 126(2) can be set aside on an application made within three months from the date thereof. Literally read the proviso restricts the limitation of time within which an application must be made, to three months from the date of the order

33. *Rer* Bakshi J in *Met Ram* v. *Ram Kumari,* 1975 Cri LJ 656, 658 (Ail).

34. *Het Ram* v. *Ram Kumari,* 1975 Cri LJ 656, 638 (All); *Vsnkatrao* v. *Rukminibai,* 15K4 Cri LJ 1291:

35. *Het Ram* v. *Ram Kumari,* 1975 Cri LJ 656, 638 (All).

36. *Arunkumar v.Chandanbai,* 1980 Cri Lj 601, 607 (Bom).

37. *Kalika* v. *Jagdei,* 1975 Cri LJ 465, 466 (All).

38. For Ss. 62-67, [S]*se supra,* para. 5.3.

39. *Dhani Ram* v. *State,* 1974 Cri LJ 1234, 1235 (All); see also, *Revappa v. Gurusanthawa,* 1960 Cri LJ 1107, 1108: AIR 1960 Mys 198; *Gurnam Singh* v. *Datto,* (1950) 51 Cri LJ 390, 39[1] 39[l:] AIR 1950 Punj 20. *See also,* discussions in 5. *Bhupinder Singh Makkar* v. *Narinder Kaur,* 1990 Cri LJ 2265 (Del),

itself.[40] However, it has been held that the period of limitation in this connection begins from the date of the knowledge of the ex parte order to the aggrieved party and not from the date of the passing of that order.[41]

The period of limitation referred to in the proviso to Section 126(2) has no application in a case where the Magistrate proceeds to hear the case ex parte without recording his satisfaction as to the deliberate avoidance on the part of the respondent to appear.[42]

Ail the evidence in the proceedings is to be recorded in the manner prescribed for summons cases.[43] If the procedure for recording of evidence in summons cases is to be followed, then the recording of evidence seems to be mandatory even when the opponent in proceedings under Section 125 is avoiding service or is wilfully neglecting to attend the court. Section 296 which permits the court to receive the affidavit of any person whose evidence is of a formal character, cannot obviously apply when under Section 125 questions relating to neglect or cruelty on the part of the respondent, the income of the respondent and the quantum of maintenance to be given to the petitioner, are to be decided.[44]

No period of limitation has been prescribed either under Section 125 or in any other provision of the Code for filing an application for maintenance.[45]

It has been held that while a divorce petition was pending in the civil court the wife need not invoke the provisions in the Code. She could invoke Section 24, Hindu Marriage Act.[46] [47] [48]

It may be noted that the Supreme Court in *Chigurupati Bambasiva Rao* v. *Chigurupati Vijayalaxmi*[47] [48] while declining a decree for divorce ordered continuance of maintenance given to the wife by the lower court under Section 125 of the Code. But in 1978 the Supreme Court in *Ramesh Chander Kaushal* v. *Veena Kaushal*[4S], treated Section 24, Hindu Marriage Act (enabling the court to pass order *pendente lite)* and Section 125 of the

40. *Hyder Khan* v. *Safoora Bee,* 1968 Cri LJ 525, 526: AIR 1968 Mvs 98; *A.S. Goui?tdan* v. *jayammal,* {1950} 51 Cri Lj 455: AIR 1950 Mad

41. *Zohra Begum* v. *Mohd. Ghouse,* 1966 Cri LJ 129, 130: AIR 1966 AP 50-*Joginder Singh* v. *Balkar an Kaur,* 1972 Cri Lj 95, 116 {P&H) (FB); *Dhani Ram* v. *State,* 1974 Cri LJ 1234, 1235 (Ail); *Meejiakshi Ammal* v. *Somasundara Nadar,* 1970 Cri LJ 817, 818: AIR 1970 Mad 242, 243; *Hemendra Nath* v. *Arch ana,* 1971 Cri LJ 817,

42. *Khembai* v. *Kajindar,* 1981 Cri Lj 690 (Kant).

43. *See supra,* para. 21.3(c) for record of evidence in summons cases.

44. *Ramesh* v. *Jaysbreeben,* 1982 Cri LJ 1460, 1462 (Bom); see also, *Shankar Gohane* v, *Kalpana*

45. *Mithu Devi* v. *Siya Ghaudhary,* 1975 Cri Lj 1694, 1695 (Pat); *Golla Seetharamulu* v. *Golla*

46. *G. Ramanathan* v. *Revathy,* 1989 Cri LJ 2037 (Mad).

47. (1997) ii- SCC 84; 1997 SCC (Cri) 1063; *also read* observations in *jasbir Kaur Sehgal* v. *Disit.*

48. (1978) 4 SCC 70: 1978 SCC (Cri) 508.

Code separately. It held that despite an order *pendente Ute* the court could order maintenance under Section 125 of the Code.

In this connection it may be noted that the Supreme Court does not seem to appreciate the purpose of Section 125 and the substantive laws dealing with marriage and divorce. In fact in *Ash ok Kumar Singh* v. *Addl. Session Judge, Varanasi*[49] *the* complaint of the wife was that her husband was impotent and hence incapable of discharging marital obligations. Instead of examining the question in the light of the substantive laws the court applied Section 125 and ordered maintenance to the wife.

It would be proper if the court appreciates the purpose of Section 125 in proper perspective and settle the law.

An order dismissing an application for maintenance on account of default of appearance on the part of the applicant-wife before the recording of evidence has been held to be an administrative order capable of being reviewed or reversed by the Magistrate.[50]

If the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the court, the Magistrate may proceed to hear and determine the case ex parted[1]

An enquiry under Sections 125 to 126 is not a trial nor the result of such inquiry can be considered as a conviction or acquittal. Therefore Section 300 of the Code does not apply and a second application under Section 125 is not barred.[52] It has been held that the second application was maintainable when the first application had been dismissed on the basis of a compromised[3] Though Section 300 is not applicable in respect of proceedings under Sections 125 to 126, it is not intended by the legislature that repeated applications should be moved one after another on the same facts. A second application can be considered with the help of Section 127 dealing with alteration in allowance because it will have ultimately the effect of modifying the original order, once maintenance has been allowed.[54]

29.7 Order of the Magistrate

The Magistrate after scrutinising and weighing the evidence and upon satisfaction of the essential conditions for granting maintenance mentioned in para. 29.4, may order the person proceeded against to make

49. 1991 Cri Lj 2.557 (Ker).

50. *Prema* v. *Sudhir Kumar,* 19So Cri LJ *So,* 86 (Del); *Sk. Alauddin* v, *Kbadiza Bibi,* 1991 Cri LJ 2035 (Cal).

51- *See,* discussions in *Balan Nair* v. *Bhavant Amma Valsalamma,* 19S7 Cri LJ

52.*Nafees Ara* v. *Asif Saadat Ali*> 1965 Cri LJ 394, 397-98: AIR 1963 AH 143; *Ramwati v. Udai Singh,* 1976 Cri LJ 500

53. *Nathuram* v. *Ramsri,* (1965} 1 Cri Lj 273, 275 (Ail); *Mango* v. *Mangtu,* 1976 Cri Lj 93,

54. *Kamwati* v. *Udai Singh,* 1976 Cri LJ 500, 501-02 (All).

a monthly allowance for the maintenance of the applicant—wife, child, father or mother, at such monthly rate "The upper limit of the amount of maintenance *i.e.* f 500 has now been removed by Parliament vide the Code of Criminal Procedure (Amendment) Act, 2.001" in the whole as such Magistrate thinks fit and to pay the same to such applicant as the Magistrate may from time to time direct, *[see,* S. 125(1)]

The proviso to Section 125(1) further provides that the Magistrate may- order the father of a legitimate or illegitimate minor female child to make such allowance to such applicant-child, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

The word "may" used in Section 125(1) confers a discretion on the court in the enquiry in awarding maintenance, which discretion has to be exercised on sound judicial principles considering the equity of each case. The fixing of the rate of allowance is to be done on the merits of each case and the separate income and means of the person claiming maintenance are relevant circumstances to be taken into account in fixing the rate.[55] In a case where the wfife was claiming maintenance against her husband, the Supreme Court has observed:

> The object of those provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income also is taken into account together with the earnings of the husband and his commitments.[56]

Again in awarding maintenance to the wife under Section 125 the court should see that the rate is not such as would tempt the wife to permanently live separately from her husband, or if she is already divorced to remain unmarried at least for long.[57]

The words "in the whole" in Section 125(1) means only one sum of money not exceeding f 500 to be awardable *to each person* claiming maintenance from the person proceeded against; these words should not be understood to mean one sum not exceeding [A] 500 for the maintenance of all the claimants taken together.[58] The quantum of maintenance is left to be decided by the Magistrate as explained below.

55. *Sampoornam* v. *Arjunan,* 1975 Cri Lj 1466, 1467 (Mad); P.T. *Ramankutti* v. *Kalyanikutti.* 1971 Cri LJ 318, 322: AIR 1971 Ker 2,2; *Bbagwart Dutt* v, *Kamla Devi.* (1975} 2 SCC 386: 1975

56. *Per* Sarkaria J in *Bhagwan Dutt* v. *Kamla Devi,* (1975) 2 SCC 386: 1975 SCC (Cri) 563, 569: 1975 Cri LJ 40; see also, *Raibari* v. *Mangara/.* 1983

57. *U.H. Khan* v. *Mababoobunnisa,* 1976 Cri LJ 395, 398 (Kant); *Syed Ahmad* v. *N.P. Taj*

58. M. *Bulteel* v, *R.C. Bulteel,* (1938) 39 Cri LJ 865: AIR 1938 Mad 721; *Prahbavati*

In one case the wife was awarded maintenance under Section 125 CrPC and alimony under the Hindu Marriage Act. Subsequently both were enhanced to ^A 800 each p.m.[59] Husband's prayer to adjust the amounts was granted by the Supreme Court which observed:

> The amount awarded under Section 125 of the CrPC for maintenance was adjustable against the amount awarded in the matrimonial proceedings and was not to be given over and above the same.[60]

The amount of A 500 was being raised by some High Courts.[61] Parliament has amended Section 125(1) by removing the clause "not exceeding five hundred rupees in the whole". This amendment enables the courts to award maintenance depending upon the circumstances of each case.[62]

The question whether a Magistrate before whom an application is made under Section 125 can make an interim order directing the person against whom the application is made under that section to pay reasonable maintenance to the applicant concerned pending disposal of the application, was answered in the affirmative in *Sai/itri* v. *Govind Singh Rawat*[63] The Magistrate has implied power to do so under Section 125.

According to the amended Section 125(2) such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order or if the court so orders, from the date of application.[64] If the husband has behaved badly the Magistrate should award maintenance not from the date of the order but from the date of the application. There ought to be compelling reasons before the wife is deprived of maintenance from the date of the application.[65] The Magistrate has discretion in granting maintenance either from the date of application or from the date of order.[66]

In a case where the wife is claiming maintenance from her husband, even a last minute offer by the husband to take back the wife may be considered by the court; and if found to be genuine and not as one put

Sumatilal, 1954 Cri Lj 1734, 1735-36: AIR 1954 Bom 546 (FB); *Ramesh Chander Kaushal* v. *Veena Kaushal,* (1978) 4 SCC 70: 1978 SCC (Cri) 508.

59. *Sudeep Chaudhary* v. *Radha Chaudhary,* (1997} ri SCC 2.86: 1998 SCC (Cri) 160: 1999 Cri Lj 466.
60. *Ibid;,* 466
61. See, *Ramfood Mina* v. *Jagrati,* 2001 Cri Lj 920 (MP) wherein the M.P. High Court gave retrospective effect to the enhancement of maintenance amount.
62. *See,* the Criminal Procedure Code (Amendment) Act, 2001 (Act 50 of 1001).
63. (1985) 4 SCC 337.
64. See also, *Sau Suman Narayan* v. *Narayan Sitaram,* 1995 Supp (4) SCC 243: 1996 SCC (Cri) 53'
65. *Makhdum Alt v. Nargis Bano,* 1983 Cri LJ m, 114 (Del); *Dharmendra Kumar Gitpta* v. *Chandra Prabha Devi,* 1990 Cri Lj 1884 (All) ruling that reasons tor granting maintenance from date of application should be given. See also, *S. A. Kaiser* v, *Noor Sahan,* 1980 Cri LJ 611, 613 (Cal); *K. Sivaram* v. *K. Mangalamba,* 1990 Cri LJ 1880 (AP) ruling that no reason need be given. Also see, *Raja Ra?n* v, *Addi S.J., Pilibhit,* 1998 Cri LJ 3365 (All),
66. *Sneh Lata* v. *Ajay Kttmar Khannat* 1999 Cri Lj 4209 (Del).

forward merely to ward off the obligation arising in the criminal proceeding, the court may reject the claim of the wife.[67]

According to Section 354(6}, every final order made under Section 125 shall contain the point or points for determination, the decision thereon and the reasons for the decision.

It has been held that an order granting interim maintenance is not an interlocutory order and revision is not barred under Section 397(2} of the Code.[68 69]

An order granting maintenance passed as a result of compromise between the husband and wife would not be a final order in terms of Sections 353 and 354 and therefore the proceedings can be revived in the event of failure of compromise.

It has been observed that husband and wife can compromise for small amount of maintenance.[70]

If the compromise is entered into between the parties without being processed through the court and consequently the application before the court is dismissed, the compromise would not be enforceable through the court for which relief the parties may have cause of action before the civil court. But where the compromise forms a part of the order, it must be taken to be a competent one under Section 125(1} since the compromise is not in derogation of the jurisdiction of the court to pass the order.[71]

Where the order of the Magistrate restoring original petition filed under Section 125 CrPC, dismissed earlier for non-appearance, was challenged as beyond his powers, it was held by the High Court of Delhi that maintenance proceedings contemplated by Chapter IX of the Code could not be equated with other proceedings under Section 125, being benevolent one, should be construed in favour of persons who seek shelter thereunder. The application under Section 125 is neither a police report as contemplated by Section 173, nor a complaint. However, final order under Section 125 must satisfy conditions laid down by Section 354(6}. Since no evidence adduced and stage of passing final order not reached, mere fact that order of Magistrate had effect of consigning petition for maintenance to record room, would not by itself be enough to clothe it with attributes of final order. The order passed by Magistrate was treated administrative in nature rather than judicial and held that he could review or reverse the same.[72]

67.*Rulda Ram* v. *Kala Devi,* 1976 Cri Lj 570 (HP).

68.*Sunil Kumar Sabharwal* v. *Neelam Sabbarwal,* 1991 Cri LJ 2056 (P&H); *Mukhtar Ali* v. *Judge, Family Court,* 1999

69. *Pavittar Singh* v. *Bhupinder Kaur,* 1988 Cri Lj 1624

70.*Kamatbam Venkatamma* v. *Kamatbam Burufu*

71. *Sailesh Padhan* v. *Harabati Padhan,* 1989 Cri LJ 1661,

72. *Prema Jain v. Sudhir Kumar Jain,* 1980 Cri Lj So (Del).

29.8 Enforcement of order of maintenance

In order to facilitate the enforcement of the maintenance order passed under Section 1x5(1), it has been made obligatory by Section 12.8 to supply a copy of the order free of cost to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid.

It has been further provided by Section 128 that such order of maintenance may be enforced by *any Magistrate in any place where* the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due. This Section 128 makes the maintenance order enforceable anywhere in India, even in a place outside the territorial jurisdiction of the Magistrate who passed the order of maintenance.

The main provision which deals with the procedure for enforcement of the order is Section 125(3). A perusal of that section would indicate that if any person ordered to pay a monthly allowance for maintenance under Section 125(1) fails without sufficient cause to comply with the order, the Magistrate has been empowered for every breach of the order to issue a warrant for levying the amount due in the manner for levying fines,[73] and is further empowered to sentence such person for the whole or any part of each month's allowance remaining unpaid *after the execution of the warrant,* to imprisonment for a term which may extend to one month or until payment, if sooner made. It is open to the Magistrate under Section 125(3) to pass the sentence of imprisonment up to one month in respect of default of each month's allowance.[74] It may be pertinent to note that the word "allowance" has been given a wider meaning by the Amendment Act, 2001. It now means "allowance for the maintenance or the interim maintenance and expenses of proceeding". In fact courts have been passing sentences of imprisonment for recovery of arrears of maintenance dispa- rately—one month's imprisonment per one month's arrears, one week's imprisonment per one month's arrears etc.[75]

It has been ruled by the Supreme Court that imprisonment imposed under this section is a mode of enforcement rather than a mode of satisfying the liability. In other words, a person ordered to pay maintenance

73. The procedure for levying fines has been given in Ss. 421-14 and has been discussed in *supra,* para. 27.7. See, *Govind Sabai* v. *Prem Devi,* 1988 Cri LJ 638 (Raj); *Hazi Abdul Kbaleque* v. *Samsun Nehar,* 1991 Cri LJ 1843

74. *Pratap Reddy* v. G. *Vijayalakshmi,* 1981 Cri LJ 2365, 2366 (AP); see also, K.R. *Chawda* v. *State of Bombay,* 1958 Cri LJ 351 (Bom) (FB); *Pokala Brahmaniah* v.

75. *Ram Bilas* v. *Bbagwati Devi,* 1991 Cri LJ 1098 (All); *Jangam Srinivasa Rao* v. *Jangam Rajesivari,* 1990 Cri LJ 2506 (AP); *Pokala Brahmaniah* v. *Pokala Padma,* 1991

may not be absolved of his liability merely because he is sent to jail.[76] [77] [78] [79] [80] This ruling is not likely to solve the attendant problems. The argument that the liability of the husband arising out of an order passed under Section 125 to make payment of maintenance is a continuing one and on account of non-payment there would be a breach of the order and therefore the Magistrate would be entitled to impose sentence on such, a person continuing him in custody until payment is made, was however not accepted by the Supreme Court in *Shahada Kbatoon* v. *Amjad Ali*[77]. After, noting that the power of the Magistrate is limited to one month's imprisonment, the court pointed out that for breach or non-compliance with orders of Magistrate the wife could approach the Magistrate again for similar relief.

Re-emphasising that maintenance payable under Section 125 is a continuing liability as declared by it in *Sbantba* v. R. G. *Sbivananjappa*[78] and *Shahada Kbatoon* v. *Amjad Ali*[79] [80], the Supreme Court in *Poongodi* v. *ThangaveP* said that proviso to Section 125(3} signifies that it is a mode of enforcement rather than mode of liability. It does not in any way creates a bar or affects the entitlement of a claimant to arrears of maintenance. The proviso contemplates the liability to be a levy of a fine and the detention of defaulter in custody would not be available to a claimant who had slept over his right and has not approached the court within a period of one year from the date of entitlement. However, the court added: in such a case the ordinary remedy for recovery of civil nature would be available.

Section 125(3), read with Section 421, empowers the Magistrate to issue a warrant for the levy of the amount of maintenance by attachment and sale of any movable property of the person ordered to pay maintenance under Section 125.[81] Therefore the attachment of the salary of such a person would be considered as in accordance with law. It has been held that future salary of a husband can be attached.[82] It has also been added that the future salary can be attached for realisation of past arrears.[83] However, this view has been rightly dissented from.[84] When a money lender or a bank has got the right to attach the salary of an official to the extent indicated in Section 60, Civil Procedure Code (CPC), in execution of a money decree or maintenance decree, it would be preposterous to say that a wife cannot seek for attachment of her husband's salary for

76. *Kuldip Kaurv. Surinder Singh,* (1989) 1 SCC 405: 1989 SCC (Cri) 171: 1989 Cri Lj 794;

77. {1999} 5 SCC *6~z:* 1999 SCC (Cri) 1029.

78.{2005} 4 SCC 468.

79. (1999) 5 SCC *6~z.*

80. (2013) 10 SCC 618.

81. V.P. *Sh'wannav. Bhadramma,* 1993 Cri LJ 418 (Kant).

82. *Surekha Mrudangia* v. *Ramacbari Mrudangia,* 1990 Cri LJ 639 (On); *Bhagwat Gaikivad* v. *Baburao Gaikwad,* 1994 Cri LJ 2393 (Bom).

83.*Mani* v. *jaykutnari,* 1998 Cri LJ 3708 (Mad).

84.*Mobd. Jahangir Khan* v. *Manoara Bibi.* 1992 Cri Lj 83 (Cal).

recovering the arrear of maintenance granted by the Magistrate. A wife who is entitled to maintenance under Section 12.5 and who is also entitled to recover the arrears under Section 125(3), cannot be placed worse than a money lender. What is available under Section 60 CPC can also be made available under Section 125(3) CrPC for the recovery of arrears of maintenance.[85]

For the enforcement of the order of maintenance under Section 125, the normal rule is, at first, to issue a distress warrant in the manner provided in the Code for levying fines; but this rule need not necessarily be followed in each and every case without considering the attending circumstances of the particular case. In a case where the husband flatly refused point blank to make any payment to the wife in the matter of the huge arrears of maintenance amount and persistently indulged in irresponsible behaviour during the court proceedings, the order sentencing the defaulting husband to imprisonment was held to be justified even though a distress warrant was not issued by the Magistrate in the first instance.[86]

Then, the first proviso to Section 125(3) enacts that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due. Thus the period of limitation is one year. Any arrear falling beyond one year is barred by limitation.[87] However where an application for levy of maintenance is made within the period of one year mentioned in the proviso, but is dismissed for default, another application made subsequently for the same purpose may be granted although such application may have been made after the period of one year mentioned in the first proviso.[88] Therefore, if successive applications for recovery of arrears of maintenance are made within a year of each other no part of the entire claim becomes time-barred.[89]

However, though the property of the defaulter can be attached and sold for the realisation of arrears of maintenance for a maximum period of one year from the date of application, yet the defaulter can be sentenced to imprisonment for recovery of arrears, which may extend beyond this period.[90]

Where the order of maintenance is made in favour of a wife (presumably not a divorced wife) the second proviso to Section 125(3) gives another

85. *Ahmed. Pasha* v. *Wajid Unissa,* 1983 Cri LJ 479, 480 (AP); however *see* the contrary position taken in *Baldevi* v. *Ramnath,* 1955 Cri LJ 62.1 (Raj);

86. *Bbnre* v. *Comatibai,* 1981 Cri LJ 789 (MP).

87. *Jagannatk* v. *Purnamashi,* 1968 Cri LJ 335, 336: AIR 1968 Ori 35; *Lakshman Rao Sakharam*

88. *Kirparam Chhotan Raotv. Kalibai,* 1960 Crj LJ 1093(1): AIR

89. *Shankar Deo v, Savitri Devi,* 1974 Cri LJ 135 (Ali); *Pokala Brabmaniah* v. *Pokala Padma*, 1991 Cri LJ

90. *Iftekhar Htissain* v. *Hameeda Begum,* 1980 Cri LJ 1212., 1213

opportunity to the husband to make a genuine bona fide offer to maintain his wife on condition of her living with him. According to that proviso "if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and make an order under this section nothwithstanding such offer, if he is satisfied that there is just ground for so doing".

If the reasons given by the wife for refusing to live with the husband are not satisfactory, the Magistrate may refuse to execute the order rather than cancel it.[91]

An execution application of maintenance order dismissed for nonappearance can be restored.[92]

As mentioned earlier, in the enforcement of the order of maintenance the sentence of imprisonment can be passed and a warrant of arrest can be issued only if recourse to attachment and sale of property (of the defaulter) fails.[93] Further, it is only consistent with the principles of natural justice that a notice should be issued before the drastic step of issuing a warrant of arrest is taken.[94]

In order to enforce the order, Section 125(3} requires that there must be a failure to comply with the order without sufficient cause.[95] The words "without sufficient cause" should be understood in the light of the Explanation to the second proviso to Section 125(3), an<A tAe Magistrate while executing the order cannot consider those very questions which could be raised or which were decided when the claim for maintenance was upheld and a direction for payment of monthly allowance had been made.[96]

Section 125 is a provision to protect the weaker of the two parties. Therefore, if an order for maintenance has been made against the deserter husband it will operate, until it is modified or cancelled by a higher court or is varied or vacated in terms of Section 125(4) or (5) or Section 127. The order is enforceable and no plea that there has been cohabitation in the interregnum or that there has been a compromise between the parties can hold good as a valid defence.[97]

91. *Jangsm Srinivasa Kao* v. *Jangam Rajeswari,* 1990
92. *Kamla Devi* v. *Mehma Singh,* 1989 Cri Lj 866 (P&H).
93. *Karnail Singh* v. *Gurdial Kany,* 1974 Cri Lj 38, 39 (P&H}; *jagannath* v. *purna?nasbn*
1968 Cri Lj 535, 356: AIR 196S Ori 35: *also see,*
94. *K. Nitbiyanandan* v. *B. Radhamani*, 1980 Cri Lj 1191, 1194
95. *Devaki* v. *D.S. Putran,* 1973 Cri Lj 294, 295 (Mys);
Sadhu Suryanarayana v. *Sadu Laxmi Sundaranvma,*
96. *Gupteshwar Pandey* v. *Ram Peari,* 1971 Cri Lj 774. 777: AIR
97. *Bhupinder Singh* v. *Dal jit Kaur,* O979) *1* SCC 3C2,
354: 1979 SCC (Cri} 302, 503: 1979 Cri LJ19S.

29.9 Domestic violence law

The Supreme Court in *Sarasivathy* v. *Babu* has ruled that the wife whom the husband deserted has to be given compensation of [A]5 lakhs and other reliefs granted by the courts below under Sections 18, 19 and 20(d), Protection of Women from Domestic Violence Act, 2005. The court also pointed out that the High Court was in error in holding that the conduct of the parties prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005 cannot be taken into consideration while passing an order under the Act.

29.10 Cancellation of the order for maintenance

(1) On proof that any wife in whose favour an order under Section 125(1) has been made *i)* is living in adultery, or *H)* that without sufficient reason she refuses to live with her husband, or *iil)* that they are living separately by mutual consent, the Magistrate shall cancel the order of maintenance. [S. 125(5)]

The abovementioned three conditions, namely, "living in adultery", "refusing to live with her husband without sufficient reason", and "living separately by mutual consent", have been elaborately discussed earlier in another context in sub-paras (2) and (5) of para. 29.4. That discussion can well be brought in here for understanding the import of the three conditions mentioned above.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under Section 125 should be cancelled, he shall cancel the order for maintenance accordingly. [S. 127(2)]

On the language of Section 127(2) as also on principle and precedent, it would be obligatory for a Magistrate to follow the judgment of a competent civil court, specifically on the point of maintenance, and consequently, to cancel or vary the earlier order of the criminal court under Section 125.[2] [3] The varied order may have prospective effect.[5]

If it is proved that the wife in whose favour an order for maintenance has been passed under Section 125(1), has refused to live with her husband without sufficient reason, then the Magistrate can, according to Section 125(5), cancel the order of maintenance. Therefore if there is a decision of a competent civil court granting decree for restitution of conjugal rights in favour of the husband showing his intention to receive the wife and that decree of restitution of conjugal rights clearly shows that the wife without reasonable excuse has withdrawn from the society of the

1. (1014) 5 SCC 712.
2. *Bhagwant Singh* v. *Surjit Kaur,* 1981 Cri Lj 151, 154
3. *Harikishan* v. *ShanUdsvi..* 1989 Cri LJ 439 (Raj).

husband, then that decree of the civil court clearly makes out a ground under Section 12.7(2.), for cancellation of the order for maintenance.[4]

It may be noted that the word "decision" in Section 127(2) means the determination of a question or controversy and not the reasons or grounds which weigh with the court in arriving at such decision.[5]

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that

{a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of such remarriage;

ib) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof. [S. 127(3)]

It may be noted that no husband can claim under Section 127(3)^ absolution from his obligation to pay maintenance under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law *whose quantum is more or less sufficient to do duty for maintenance allowance.* The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute.[6]

The sum which, under any customary or personal law applicable to the parties, was payable on such divorce referred to in Section 127(3)^) will not take payments of meagre amounts by way of customary or personal law requirement. The provisions will apply so as to enable cancellation of an order passed under Section 125 only if the sum paid is a reasonable substitute for provision for future maintenance. Such payment may be required by custom or personal law to be paid on divorce; but it will

4. *Harssh Mansukhlal* v. *Hansagauri Ramshanker,* 1982 Cri LJ 2033, 2036 (Guj).

5. *Ranjit Kumar* v. *Swaha Rani.* 1979 Cri Lj 1301, 1303 (Cal).

6. Bai Tctbira v. *Alt Hussain Fidaalli Chothia,* (1979) 2 SCC 316. 321: 1979 SCC (Cri) 475, 478: 1979 Cri Lj 151; *see also,* the forceful judgment in *Fuzlunbi* v. *K. Khader Vali,* (1980) 4

terminate the liability to pay future maintenance only if it is a capitalised substitute for payment of maintenance periodically.[7]

While Section does provide for cancellation of the maintenance order on payment of dower if a woman has been divorced, the said clause does not contemplate cancellation of maintenance where a woman obtains divorce from her husband through a civil court under the provisions of the Act of 1939. In this connection Section clearly provides that where a woman obtains divorce from her husband the amount of maintenance cannot be cancelled until she voluntarily relinquishes or surrenders her rights to the amount of maintenance.[8]

29.11 Alteration *in* allowance

(i) On proof of a change in the circumstances of any person, receiving under Section. 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit.

An application for an increase or decrease of the allowance can be made consequent upon a change in the circumstance of either party at the time of the application for alteration.[9]

It has been held that a court cannot insist upon payment of maintenance as a precondition to hearing his petition under Section 127.[10]

It appears from the language of Section 127(1) above that change of circumstance envisaged by it is a change of pecuniary or other circumstance of the party paying or receiving allowance, which would justify an increase or a decrease of the amount of maintenance originally fixed.[11] The fall in purchasing power of money or the husband's retirement from service etc. have been held to be changes of pecuniary situation.[12]

Whereas under Section 125(2) the legislature has left it to the discretion of the Magistrate to award maintenance either from the date of the

7. *Thiiothama* v. *Kunjappan,* 19S5 Cri IJ 273, 278 (Ker).

8. *Zohara Khatoon v. Mohd. Ibrahim,* (1981) 2 SCO 500: 1981 SCC (Cri) 517, 528: 1981

9. *Meenakshi Ammal* v./. *Balakrishnan,* 1980 Cri LJ izoc, izor (Mad).

10. *A.shok Yeshwant Samant* v. *Suparna Ashok Samant, tp<pi* Cri Lj 766

11. *Gulrozbanu* v. *Kamarali,* 1974 Cri Lj 1438, 1440 (Bom); *N.E. Vasudevan Nairv. Kalyani Amma,* 1970 Cri LJ ir73, 075-76 (Ker); *Chander Parkash* v. *Shda Rani,* 1968 Cri Lj 1155, 1155: AIR 1968 Dei 174; *State v. Jankibai,* 1956 Cri LJ 731: AIR 1956 Bom 432.

Amended S. 127(1) lays down:

127. *Alteration in allowance.*—(1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or

12. *Dhan Raj* v. *Kishni,* 1998 Cri LJ 1312 (Raj); T. *Kausalya* v. T. *Narayana Reddy,* 1998 Cri

application or from the date of the order, no such discretion has been left to him while dealing an application under Section 127(1). Therefore, the order of alteration can. be effective from the date of such order and the same cannot be made effective from the date of the application for alteration.[13] It has been held that the enhancement order could be passed by the court which awarded the maintenance and not the execution court.[14]

"It is pertinent to note that under the revised Section 127(1) the Magistrate has discretion to make alteration, as he thinks fit, in the allowance for the rn.aintenan.ee or the interim maintenance as the case may be".

The Amendment Act has widened the meaning of "maintenance" to include "maintenance or interim maintenance" under Section 127(3) (c). Similarly under Section 127(4) monthly allowance has been clarified to include monthly allowance for the maintenance and interim maintenance or any of them. This explanatory meaning is made applicable to Section 128 also.

It is interesting to note that the Amendment Act has prescribed the period of 60 days for the disposal of the claim for monthly allowance vide the third proviso to Section 125. Similar provision has been incorporated in the Hindu Marriage Act, 1955 also.[15] * [17]

(2) Where it appears to the Magistrate that in consequence of any decision of a competent civil court, any order made under Section 125 should be varied, he shall vary the order accordingly. [S. 127(2)] The discretion given to the Magistrate is to be exercised judicially."[16] [17]

in a case of alimony to the divorced wife under Section 37 of the Special Marriage Act, 1:954 it has been held by the Supreme Court[1]"' that a decree for maintenance or alimony does not abate or get extinguished with the death of the husband in the same way as any other decree (even though not charged on the husband's property) would not get so extinguished. Therefore if the husband has left behind an estate at the time

13. *Bansi Lai* v. *Pushpa Devi,* 1982. Cri Lj TOSI (j&K); see also, *Harlkishan* v, *Shantidevi,* 1989 Cri L] 439 *(R<L)):Joydeb Chakraborty* v. *Bharti Chakravarty,* 1994 Cri Lj 2.2.34 (Ca'i); *Pilli Venkanna* v. *Pilli Nookalamma,* 1998 Cri Lj 192.2. (AP); but *see* contra, *Abdul Hamid* v.
14. *Eswaran* v. *Plchayee,* 1998 Cri Lj 3076 (Mad).
15. *See.,* Gazette of India, Extra. Part II, S. 1.
1.6. *Shiela Ravi* v. *Durga Prasad,* (1965) 1 Cri Lj 2.03: AIR 1965 Pun; 79, 80: see also, *Sudeep Chaudhary* v. *Radha Chaudbary,* (1997} IT. SCC *ZS6:* 1998 SCC (Cri) 160:
17. *Arana Basu Mullick* v. *Dorothea Mitra,* (1983) 3 SCC 522: 1983 SCC (Cri) 739.

the proceedings, and the complicated questions that might arise as to the determination of the persons liable and the extent of their liability after the death of the person ordered to pay maintenance under Section 125, it is doubtful whether the criminal courts would be inclined in such cases to adopt the view taken by the Supreme Court in relation to the execution of a civil decree for maintenance under the Special Marriage Act.

29.12 Civil court to take into account the sum received in pursuance of the order under Section 125

At the time of making any decree for the recovery of any maintenance or dowry by any person to whom a monthly allowance has been ordered to be paid under Section 125, the civil court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowances in pursuance of the said order. [S. 127(4}]

Chapter 30

Miscellaneous Provisions

Object and scope of the chapter **30.1**

The first 29 chapters of this book dealt with the main provisions of the Code topic-wise. For this purpose different provisions of the Code having bearing on a particular topic had often to be brought together in a setting different from that of the Code. This was considered expedient and necessary for a better comprehension of the topics as such, as well as for an understanding of the inter-relation and inter-dependence of the various provisions constituting the Code. However, in this process of regrouping of the sections for the above purposes, certain provisions of the Code, though otherwise useful, remained rather out of focus. The present chapter, which is incidentally the last chapter, draws attention to such provisions and indicates their functions. In a way, the present chapter can be considered as a miscellany. For convenience, these assorted provisions have been grouped in seven parts—Part I deals with some definitions, interpretations and other allied matters. Part II mentions the mode of conferring powers under the Code, Part III provides for certain administrative arrangements, Part IV deals with Rules and Forms, Part V considers provisions relating to disposal of property and documents. Part VI deals with some miscellaneous assorted provisions, and Part VII considers consequences of irregularities of procedure and inherent powers of the High Court.

PART I

Definitions, Interpretations, etc.

Definitions **30.2**

Section z gives definitions of 24 terms and wherever the question of ascertaining the real meaning of any of these terms arises, the meaning given

by the definition in Section 2 shall be considered as the correct meaning unless the context otherwise requires. Some of the definitions given in Section 2 have already been considered for instance, "bailable offence", "cognizable offence", "summons case", "warrant case", etc.[1] The other definitions in Section 2 are as given below:

1. "High Court" means:
   - *(i)* in relation to any State, the High Court for that State;
   - *(ii)* in relation to a Union territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court;
   - *(Hi)* in relation to any other Union territory, the highest court of criminal appeal for that territory other than the Supreme Court of India. [S. *z{e)]*
2. "India" means the territories to which this Code extends. [S. 2{/j]
3. "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath. [S. zhjj

   The terms "inquiry" and "investigation" have been defined in clauses (g) and *(h)* of Section 2 and were considered earlier in para. 7.3. From these definitions it would be seen that a judicial proceeding would include any "inquiry" or "trial" but it would not cover any "investigation".[2]
4. "Local jurisdiction" in relation to a Court or Magistrate, means the local area within which the Court or Magistrate may exercise all or any of its powers under this Code and such local area may comprise the whole of the State, or any part of the State, as the Srate Government may, by notification specify. [S. 2{/}]
5. "Metropolitan area" means the area declared, or deemed to be declared, under Section 8, to be a metropolitan area. [S, *z(k)*\

   Section 8 has been considered earlier in para. 2.2.
6. "Notification" means a notification published in the Official Gazette. [S. [2]('**77**[2])j
7. "Offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20, Cattle Trespass Act, 1871 (1 of 1871). [S. *z(n}}*
8. "Place" includes a house, building, tent, vehicle and vessel. [$. 2(p)j
9- "Pleader", when used with reference to any proceeding in any court,

   means a person authorised by or under any law for the time being in force, to practise in such court, and includes any other person appointed with the permission of the court to act in such proceeding. [S, *z(q)]*

1. *See supra,* els. *(a), ic),* (w), *Is),* S. *t}* para. 5.9, 4.3.,
2. *Tung Nath Ojha* v. *Haji Nasiruddin Khan,* 1989 Cri
Lj 1846 (Pat)

Anyone who is not an advocate, cannot as of right, force himself into any court and claim to plead for another. Permission may, however, be granted by the court taking the justice of situation and several other factors into consideration for such non-professional representation. This approach accords with the policy of the Code as spelt out in Section *2.{q)P*

In *S. Balasubramanian* v. *Commr. of Police*[3 4], the Madras High Court held that in case the accused has not sought permission from High Court to appoint power of attorney to act on his behalf, his appearance through power of attorney is liable to be dismissed.

10. "Prescribed" means prescribed by rules made under this Code. *[S.z(t)*

11. "Sub-division" means a sub-division of a district. [S. *z{v)}*

In addition to the 24 definitions given in Section 2, the Code imports the definitions of certain terms provided in the Penal Code, i860 (IPC). According to clause (y) of Section 2, words and expressions used herein and not defined but defined in the IPC have the meanings respectively assigned to them in that Code unless the context otherwise requires.

Construction and references

30.3

The Code seeks to bring about separation of the judiciary from the Executive, whereby the functions of the Magistrates under the Code have been allocated between the judicial and Executive Magistrates. It was therefore considered necessary to insert a rule of construction in respect of laws containing references to Magistrates so as to ensure that they also fit in the scheme of separation adopted under the Code.[5] In this connection Section 3 provides as follows:

3. (1} In this Code,—

(a) any reference, without any qualifying words, to a Magistrate, shall he construed, unless the context otherwise requires,—

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(«) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

{h) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,— [3 4 5]

Construction of references

3. *Hariskankar Rastogi* v. *Girdhari Sharma,* {1978) 2 SCC 165: 1978 SCC (Cri) 16%.

170: 1978 Cri Lj 778; *T.C, Mathai* v. *District & Sessions*

4. 2005 Cri LJ 385 (Mad).

5. *See,* joint Committee Report, p. v.

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area;

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(z) In this Code, unless the context otherwise requires, any reference to the Court of a judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code.—

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

{b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

{c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4} Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters—

(a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or ***{b)*** **which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.**

30,4 Existing territorial divisions to be construed as being formed under the Cods

As mentioned earlier in para. z,z, each State, for the purposes of the Code, is territorially divided into divisions, districts and sub-divisions. It has therefore been considered expedient to provide by Section 7(4} that Ahe sessions divisions, districts and sub-divisions existing in a State at the commencement of this Code *[i.e.* on x-4-1974} shall be deemed to have been formed under this section".

Repeal and savings 30,5

In this connection Section 484 provides as follows:

484. (1) The Criminal Procedure Code, 1898, (5 of 1898}, is hereby repealed. *Repeal and savings (z)* Notwithstanding such repeal,—

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), as in force immediately before such commencement, (hereinafter referred to as the Old Code), as if this Code had not come into force:

Provided that every inquiry under Chapter XVIII of the Old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;

\b) all notifications published, proclamations issued, powers conferred, forms prescribed, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the Old Code and which are in force immediately before the commencement of this Code, shall be deemed, respectively, to have been published, issued, conferred, prescribed, defined, passed or made under the corresponding provisions of this Code;

(c) any sanction accorded or consent given under the Old Code in pursuance of which no proceeding was commenced under that Code, shall be deemed to have been accorded or given under the corresponding provisions of this Code and proceedings may be commenced under this Code in pursuance of such sanction or consent;

{d) the provisions of the Old Code shall continue to apply in relation to every prosecution against a Ruler within the meaning of Article 363 of the Constitution.

(3) Where the period prescribed for an application or other proceeding under the Old Code had expired on or before the commencement of this Code, nothing in this Code shall be construed as enabling any such application to be made or proceeding to be commenced under this Code by reason only of the fact that a longer period therefor is prescribed by this Code or provisions are made in this Code for the extension of time.

The old Criminal Procedure Code, 1898 has been repealed and replaced by the present Criminal Procedure Code, 1973. This new Code has already come into force from 1 April 1974.

Sub-sections (2.) and (3) of Section 484 provide for smooth transition from the old Code to the new Code. Transition problems do crop up and the courts have to interpret and depend upon Section 484 for finding solutions to such problems. In course of time the section obviously will be of no use in the actual working of the Code. In fact the transitory period being almost over, the section has more or less spent its force and utility. Therefore the judicial decisions explaining the scope and ambit of Section 484, though important in their own way, have not been discussed here.

PART II
Mode of Conferring and Withdrawing of Powers

Conferment and withdrawal of powers

30.6 In this connection Sections 32 to 35 provide as follows:

Mode of conferring powers

32. In conferring powers under this Code, the High Court or the State Government, as the case may be, may, by order, empower persons specially by name or in virtue of their offices or classes of officials generally by their official titles.

{2} Every such order shall take effect from the date on which it is communicated to the person so empowered.

Powers of officers

33. Whenever any person holding an office in the service of Government who has been invested by the High Court or the State Government with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same State Government, he shall, unless the High Court or the State Government, as the case may be, otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed,

Withdrawal of powers

34. (3) The High Court or the State Government, as the case may be, may withdraw all or any of the powers conferred by it under this Code on any person or by any officer subordinate to it.

Powers of Judges and Magistra tes exercisable by their successors-in- office

{2} Any powers conferred by the Chief judicial Magistrate or by the District Magistrate may be withdrawn by the respective Magistrate by whom such powers were conferred.

35. (x) Subject to the other provisions of this Code, the powers and duties of a judge or Magistrate may be exercised or performed by his successor-in-office.

(2; When there is any doubt as to who is the successor-in-office of any Additional or Assistant Sessions judge, the Sessions judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings no order thereunder, be deemed to be the successor-in-office of

30.7 such Additional or Assistant Sessions judge.

(3) When there is any doubt as to who is the successor-in-office of any Magistrate, the Chief Judicial Magistrate, or the District Magistrate, as the case may be, shall determine by order in writing the Magistrate who shall,

would be deemed to have been so declared as a metropolitan area.[6 7] Subsections {3), (4) and (5) of Section 8 deal with extension, reduction, or alteration of a metropolitan area or its cesser as such area, and matters consequential thereto.

These sub-sections are as given below:

8. (3} The State Government may, by notification, extend, reduce or alter the *Metropolitan areas* limits of a metropolitan area but the reduction or alteration shall not he so made as to reduce the population of such area to less than one million.

(4} Where, after an area has been declared, or deemed to have been declared to be, a metropolitan area, the population of such area falls below one million, such area shall, on and from such date as the State Government may, by notification, specify in this behalf, cease to be a metropolitan area; but notwithstanding such cesser, any inquiry, trial or appeal pending immediately before such cesser before any Court or Magistrate in such area shall continue to be dealt with under this Code, as if such cesser had not taken place.

(5} Where the State Government reduces or alters, under sub-section (3), the limits of any metropolitan area, such reduction or alteration shall not affect any inquiry, trial or appeal pending immediately before such reduction or alteration before any Court or Magistrate, and every such inquiry, trial or appeal shall continue to be dealt with under this Code as if such reduction or alteration had not taken place.

Explanation. —In this section, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

30.8 Arrangements when a Sessions Judge is overworked or when his office is vacant

In this connection sub-sections (4} and (5) of Section 9 provide as follows:

9. {4) The Sessions judge of one sessions division may be appointed by the *Court of Session* High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places In the other division as the High Court may direct.

(5) Where the office of the Sessions judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions judge, or, if there be no Additional or Assistant Sessions judge, by a Chief Judicial Magistrate, in the sessions division; and every such judge or Magistrate shall have jurisdiction to deal with any such application.

Occasionally, owing to sudden transfer or demise of the Sessions judge and delay in the choosing and posting of his successor, the Sessions Division might remain without a judge for a considerable time causing great hardship and inconvenience to the public. The express provision contained in the above sub-section (5} of Section 9 would enable the High Court to take action in such a contingency/ [6 7]

6. *See supra,* sub-secs, (x) and (2) of S.
7. *See,* 41st Report, pp. 2.0-21, para.

30.9 Temporary arrangement when the office of a District Magistrate is vacant

Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate. [S. 20(3)]

PART IV

Rules and Forms

30.10 Power of High Court to make rules

In this connection Section 477 provides as follows:

Power of High Court to make rules

477. (1) Every High Court may, with the previous approval of the State Government, make rules—

(a) as to the persons who may be permitted to act as petition-writers in the Criminal Courts subordinate to ir;

(b) regulating the issue of licences to such persons, the conduct of business by them, and the scale of fees to be charged by them;

(c) providing a penalty for a contravention of any of the rules so made and determining the authority by which such contravention may be investi

The Supreme Court, while giving a direction to the Sessions Judge that the accused be permitted to sit down during the trial, has observed:

> In fact, we are unable to understand how any Court in our country, can at all insist that the accused shall keep on standing during the trial, particularly when the trial is long and arduous as in this case. We hope that all the High Courts in India will take appropriate steps, if they have not already done so, to provide in their respective Criminal Manuals prepared under Section 477(1} of the Criminal Procedure Code that the accused shall be permitted to sit down during the trial unless it becomes necessary for the accused to stand up for any specific purpose, as for example, for the purpose of identification.[8]

Apart from the above rule-making power, the High Court can make a general rule prescribing the manner in which the evidence of witnesses and the examination of the accused shall be taken down in cases coming before it. In this connection Section 2.83 provides as follows:

8. *Avtar Singh* v. *State* o/M.P., (1982.) 1 SCC 438: 1982. SCC (Cri) 248: 1982 Cri Lj 1740.

Record in High Court

283. Every High Court may, by general rule, prescribe the manner in which the evidence of witnesses and the examination of the accused shall be taken down in cases coming before it; and such evidence and examination shall be taken down in accordance with such rule.

Rule-making powers of other Courts **30.11**

(1) *Rule-making by a Sessions Judge.*—The Sessions Judge may, from time to time, make rules consistent with this Code, as to the distribution of business among Assistant Sessions judges exercising jurisdiction in his court. [S. 10(2}]

The Sessions judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate and every such judge or Magistrate shall be deemed to have jurisdiction to deal with any such application. [S. 10(3)]

(2} *Rule-making by Chief Judicial Magistrate.*—The Chief Judicial Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Judicial Magistrates subordinate to him. [S. 15(2.)]

{3) *Rule-making by Chief Metropolitan Magistrate.*—The Chief Metropolitan Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Metropolitan Magistrates and as to the allocation of business to an Additional Chief Metropolitan Magistrate. [S. 19(3)]

Section 19(3) contemplates rules or special orders to be made by the Chief Metropolitan Magistrate as to the distribution of business to be consistent with Code.[9]

(4) *Ride-making by District Magistrate.*—The District Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Executive Magistrates subordinate to him and as to the allocation of business to an Additional District Magistrate. [S. 23(2)]

Other rule-making powers **30,12**

The rule-making powers mentioned in paras 30,10 and 30.11 are not the only powers conferred by the Code for rule-making. There are also other provisions in the Code authorising the making of rules for certain purposes, for instance. Section 160(2) empowers the State Government to make rules for providing the payment of reasonable expenses of any person required by an investigation, police officer to attend at any place

9. *Narendra Amratlal Dalai* v. *State of Gujarat.* 1978 Cri LJ 1193, 1198 (Guj).

other than his residence, Section 304(2.) empowers the High Court to make rules for the selection of pleaders, the facilities to be provided to them and their remuneration in respect of providing legal aid to accused person, Section 312 empowers the State to make rules as to the payment of reasonable expenses of complainants and witnesses etc. But these matters have already been considered earlier.[10]

30.13 Forms

In this connection Section 476 provides as follows:

Forms

> 476. Subject to the power conferred by Article 227 of the Constitution, the forms set forth in the Second Schedule, with such variations as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

The Second Schedule has given in all 46 forms. Some of these forms have already been reproduced and considered in earlier chapters.[11] It was not considered expedient to reproduce all the forms while discussing the relevant provisions in the Code. However, while making detailed study of the provisions, it would be desirable to look into the relevant forms prescribed in the Second Schedule.

Article 227 of the Constitution referred to above in Section 476, gives power of superintendence to the High Court over all courts within its territorial jurisdiction and empowers it, inter alia, to make general rules and to prescribe forms for regulating the practice and proceedings of such courts.[12]

Part V
Disposal of Property and Documents

30.14 Introductory

Sections 451 to 459 make elaborate provisions regarding disposal of property: *i)* in respect of which an offence appears to have been committed, or *ii)* which appears to have been used for the commission of an offence, or *Hi)* which has been produced before the court, or *iv)* which is in the custody of the court.

Provisions have been made for the passing of interim orders for the custody and disposal of such property pending inquiry or trial and of final orders at the conclusion of inquiry or trial.[13]

Detailed provisions have been made in regard to property seized by the police. Such property may be of various classes, such as, articles found

10. *See supra,* paras. 8.7,
11. *See supra,* paras. 5.3,
12. *Sayeed Ahmad* v.
13. *See,* 4isr

upon search of a person arrested, property alleged or suspected to be stolen or property found under circumstances which create suspicion of the commission of an offence.[14]

The modes of disposal of the property are again numerous, and the particular mode is, for obvious reasons, left to the discretion of the court. Thus "disposal of the property" may be by destruction, confiscation, delivery to any person claiming to be entitled to possession of the property, restoration to person dispossessed, or sale etc.[15]

Order for custody and disposal of property during inquiry or trial

30.15

Section 451 empowers the criminal court to make orders for interim custody of the property produced before it during enquiry and trial. On the other hand, as would be seen later, Section 457 empowers a Magistrate to deal with the property seized by the police but not produced before a criminal court during any inquiry or trial. Section 451 provides as follows:

Order for custody and disposal of property pending trial in certain cases

> 451. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.
>
> *Explanation* .—For the purposes of this section, "property" includes—
>
> *\a)* property of any kind or document which is produced before the Court or which is in its custody,
>
> *(b)* any property' regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

The section empowers the court to pass an order for custody and disposal of property pending inquiry or trial in respect of both 1) property produced before the court during inquiry or trial and 2.) property regarding which the offence appears to have been committed or which appears to have been used for commission of offence.[16] The section applies even to a property which has been exhibited. Of course, it wilt depend on the facts and circumstances of each case

14. *Ibid.*

15. *Ibid.*

16.

17. *J.P. Saraogi* v. *2amal Ahmad,* 1981 Cri LJ

is within the purview of the section. Section 451 however will have no application unless property is produced before the court during inquiry or trial.[18] Nor will the provisions be applicable to property produced before the Executive Authorities under the provisions of special laws such as the Customs Act, 1962, the Essential Commodities Act, 1955.[19] An immovable property which is seized or sealed by the police during the investigation becomes *custodia legis* immediately on the Magistrate taking cognizance of the offence on the police report.[20]

The section gives wide discretion to the court, but such discretion must be exercised judicially and not arbitrarily or capriciously.[21] Obviously the discretion which is to be exercised judicially, cannot be so exercised unless the parties claiming an interest in the seized property have been heard in the matter.[22] Further each case will be governed by its own facts and circumstances and it cannot be laid down as a broad proposition of law that in no case can the custody of the seized property be given to either the accused or the complainant pending disposal of the main case. The nature of property and the laws relating to its use are important considerations while making an order as to the interim custody of the property. In the case of a motor vehicle, for example, the registration of the vehicle in the name of one party may be a ground for giving the interim custody to him unless the other party is able to establish his superior title or claim over it.[23] It has been held that it is an erroneous exercise of judicial discretion to casually postpone the issue of a custody of a motor vehicle by the trial court till the final decision of a case which may take a long time. Save in exceptional circumstances the issue of the custody of a motor vehicle (with sufficient safeguards for its production during the course of the trial) must be expeditiously decided.[24] Interim custody of the vehicle, however, should not be given to one who has acquired possession through

18. *See,* observa
19. *Handhir Singh* v. *Directora te of Revenue*
20. *Narbada* v,
21. *U. Kariyappa* v. *?. 2'1. Mohd. Yousuf v.*
23. *Mohd. Yousuf* v. *Abdul Ah ad,* 1972 Cri Lj
24. *Deo Dutia* v. *Manohar Lai,* 1974 Cri Lj 1156,

communication of a crime.[2r]> Because if a mechanically propelled vehicle is kept idle for a long time, not only there are chances of it being spoiled, but the person who is deprived of the possession of the vehicle is likely to put to great loss in his business. A jeep involved in a serious bomb explosion was refused to be released under Section 451 as it was required to be produced in the same condition during trial.[25 26] Considering the provisions of the Motor Vehicles Act, the person in whose favour the certificate of registration is issued or stands, ordinarily and obviously, is the proper person for the interim custody of the vehicle seized and produced before the criminal court.[25 26 27]

It is within the competence of the Magistrate to dispose by sale any perishable or of like property. Non-payment of trade tax (even if it was due} is not a valid ground for refusal to release goods. The Trade Tax Department was to initiate proceedings in such a case.[28]

If a Magistrate once passes an order under Section 451 as appreciation of the facts and circumstances of the case, it cannot be said that till the final disposal of the case when he could pass an order under Section 45a, he is *functus officio* to pass appropriate order. There may be a case where a person to whom the Magistrate directed the property to be given may be reluctant to continue in custody after some time. It would be open to him to request the court to relieve him of custody to pass a disposal order afresh. There may be a case where a person who is given custody under Section 451 is not taking care of the property or is misusing it. That may occasion a fresh order or a modified order being passed by the Magistrate. There may be a case where a person who has been given the property on superdari selling it to somebody and then approaching the court to get it back on superdari again. This may occasion a new order giving the property or superdari to the person who paid its price to the original owner who was given the property in the first instance.[29] Therefore it cannot be said that the order once passed under Section 451 is a final order. It is necessarily interlocutory in character. Therefore, a revision petition against such an order is not tenable.[30]

The ambit of Section 451 is not confined merely to property which is subject to speedy and natural decay but also wide-rangingly extends to

25. *B. Lalithachand Nabarv. State,*
26. *Sarjoo Prasad* v. *State ofU.P.,*
27. *U. Kariyappa* v. *P.*
28. *Kishan Lai* v. *State ofU.P., zoo 6* Cri LJ 227 (All). See also,
29. *Sat Singh* v . *State ofPunjab,*
30. *Vasu v. T. Unnik*

each and every case of property if the court is of the opinion that it is otherwise expedient to make an order for sale or disposal thereunder.[31]

30.16 Order for disposal of property at conclusion of inquiry or trial

In this connection Section 452 provides as follows:

Order for disposal of property at

452. (i) When an inquiry or trial in any Criminal Court: is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (i) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under subsection (1), direct the property to be delivered to the Chief judicial Magistrate, who shall thereupon deal with it in the manner provided in Sections 457, 458 and 459.

{4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section {2), an order made under sub-section (i) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

For passing an order under this section it is not necessary that the trial court should examine witnesses and hold an elaborate inquiry.[32]

Ordinarily, if the accused is acquitted of an offence in respect of any property, the court would restore that property to him if it had been recovered from his possession.[33] However this cannot be taken as a hard and fast rule and it must depend upon the circumstances of each case, and

31. *Bair a} Singh v. State of Punjab,* 1982 Cri Lj 1374, 1377 (P&B)

32. *Govindacbari* v. *State,* 197$ Cri Lj 428, 42$ (Mad); *Meena Ram* v. *State of H.P.,* 1990 Cri LJ *547 (HP).

33. *Somasundaram Ckettiar* v. *Rakkammal,* 1973 Cri Lj 731, 732 (Mad); *Muthiah Muthirian* v. *Vairaperumal Muthirian,* 1954 Cri Lj 207, 208 (Mad); *Salta? AH* v. *Afzal Mohammed,* (1927) 28 Cn Lj 546, 547: AIR 1927 Cal 532; *Har Bbagwandas* v. *Diiaan Ghana,* i960 Cri Lj 919, 922: AIR i960 MP 195;

the accused cannot claim as of right the return of the article seized from his custody or possession.[34 35]

This section, apart from providing that any property produced before the court or in respect of which any offence has been committed be delivered to a complainant or an accused person or to any other person entitled to its possession, does also mention that the property may be ordered to be confiscated. However the exercise of this power is the exercise of a judicial discretion, and the order so made can be justified only when it could be said that in consideration of all the circumstances of the case, such an order is appropriate.[33] Where the accused was convicted under the Prevention of Corruption Act for being found in possession of property disproportionate to his known sources of income, the order confiscating the property in his possession for which he could not satisfactorily account, was held to be valid under Section 45a.[36]

The court can exercise powers under this section only if there is an inquiry or trial and not otherwise. In a case where the inquiry abates on the death of the accused, then there is neither any inquiry or trial pending nor concluded and as such the order for disposal of property cannot be passed either under Section 451 or Section 452 of the Code.[37] When an application is made for return of an item of case property there is no need for the court to call for production of all items of property.[38]

Where the accused who had confessed to the police that the property recovered from him did not belong to him, and is acquitted on account of incomplete evidence or getting benefit of doubt, the property recovered from him should not be returned to him, as such confession though inadmissible under Section 25, Evidence Act is admissible for other purposes.[39]

Property used for the commission of an offence should not normally be returned to the accused found guilty of the offence even though he is the owner of the property.[40]

34. *Bal Kaur* v. *State of H.P.,* 1976 Cri LJ 1928, 1930 (HP): see also, *Gour Chandra Gouda* v. *State, 1 $68 Cri LJ* 528, 531: AIR 7968 Ori *67; Arjun Padhy* v. *State of Orissa,* {1965) 2 Cri Lj 659, 660: AIR 1965 Ori 198; *Shankar Lai* v. *Prem Sagan* 1976 On Lj *66%,* 663-64 (Raj): *Mevaidas Takbatmal*
35. *Suleman Issa* v. *State of Bombay,* 1954 Cri Lj 88x: AIR 1954 SC 312.; see also. *State* v. *Rajinder Singh,* 1973 Cri Lj 145, 146
36. *Mirza Iqbal Hussain* v. *State ofV.P.,* (1982) 3 SCC 516: 1983 SCC (Cri) in, 115: 1983
37. *State* v. *Sana Rani.* 1973 Cri Lj 784. 7S5 (Cal).
38. *Valliammal* v. *State.* 1.997 Cri Lj 2019 (Mad).
39. *Prakash Chandra fain* v. *Jagdisb,* 1958 Cri Lj 1189, 1x90: AIR. 1958 MP 270; *Dhanrai Baldeokishan* v. *State,* {1965) 2 Cri Lj 805: AIR 1965 Raj 238; *Bal Kaur* v. *State of H.P.,* 1976 Cri Lj
40. *Ramasivami Aiyer* v. *Yenkateswra Aiyar,* {1913} 14 Cri Lj 27, 30 (Mad): *Philip Spratt v. Emperor,* (1954) 35 Cri Lj 1389, 1390; AIR 1934 All 207; *Nanak* v. *State ofU.P.,* 1974 Cri. Lj 1402, 1403 (AH): but see also. *Balamal Matlotnal v. State of*

A question of title to property cannot be satisfactorily decided by a criminal court; but where property is taken by violence by one person under the colour of a civil claim, the criminal court should ordinarily order the property so taken by violence to be returned to the person from whom it was taken.[41]

In a case where the title to the stolen property was in dispute and it was not clear from evidence as to who the owner was, it was held that it would be open to the Court of Session under Section 452(3) to direct the property to be delivered to the Chief Judicial Magistrate who was to deal with it in the manner provided under Sections 457, 458 and 459.[42]

It has been held that though Section 452 did not expressly require any notice to be issued or a hearing to be given to the party adversely affected, still in the eye of law there was a necessary implication in Section 452 of the Code that the party adversely affected should be heard before the court makes an order for return of seized property.[43] The party should also be heard before the court orders confiscation.[44]

The expression "when an appeal is presented" in Section 452(4) may include either an appeal when presented from the disposal order under Section 454(1) or an appeal when presented from the main order of conviction or acquittal as the case may be, because the disposal order may be modified, altered or annulled not only by the court entertaining an appeal under Section 454(1) but also by the court of appeal dealing with the case in which the disposal order is passed. In a composite appeal against conviction and direction pertaining to disposal of property the appellate court acquitted the accused but did not give any direction as to disposal of property. There was no separate appeal on direction of disposal of property. In these circumstances the direction given by the trial court giving certain property to the father of the deceased was allowed to stand.[45] The only purpose of Section 452(4) is to stay carrying out of the disposal order until the appeal from it under Section 454(1) is finally disposed of or until the appeal from the order of conviction or of acquittal is disposed of. It serves no other purpose.[46]

30.17 Payment to innocent purchaser of money found on accused

In this connection Section 453 provides as follows:

41.*Nallusu/ami Reddi* v. *Nallammal,* (1943) 44 Cri

42.*Andun Podhan v. State of Orissa,* 1987 Cri Lj 1478

43. *Bombay Cycle & Motor Agency* v. *B.R. Pandey,* 1975 Cri LJ 820, 830 (Bom); *SBI v.*

44. *Baikunthnath Mohanta* v. *State,*

45. *Prabodh Kumar Pattnaik* v.

46.*Ramavatar Sharma* v, *Sk.*

Payment to innocent purchaser of money found on

453- When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person bought the stolen property from him without knowing or having reason to believe that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

30.18

*Appeal against orders under Section **452** or Section **453***

Appeal against orders under Section **452** or Section **453**

Section 454 provides as follows:

454. (1) Any person aggrieved by an order made by a Court under Section 452 or Section 453, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.

(2) On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, or may modify, alter or annul the order and make any further orders that may be just.

(3) The powers referred to in sub-section (2} may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in sub-section (i) was made.

The section confers an independent right of appeal against orders regarding disposal of property. The party aggrieved by an order of disposal of property may not be the same as the party aggrieved by the main judgment and, so, an independent right of appeal under this section becomes necessary.[47] [48] [49]

It is true that Sections 452 and 454 confer a discretion on the court as regards the disposal of the property seized or produced before it or regarding where any offence was said to have been committed. But the court has to exercise its discretion according to proper legal principle.[48] [49]

Section 454 does not expressly require a notice to be issued, or a hearing to be given to the parties adversely affected. But though the statute is silent and does not expressly require issue of any notice there is in the eye of law a necessary implication that the parties adversely affected should be heard before the court makes an order for return of the seized property.[45]

When an appeal against the main judgment is pending before the appellate court and the aggrieved party also files an appeal under Section 454 against the order passed under Section 452, it is to be expected that both the appeals will be

47. *See,* Notes on CL 463
48. SB/
v.
49. *Ibid.*

will be concerned solely with the correctness or otherwise of the order for disposal of the property, and not with the findings of the trial court in the main case. In any event, the appellate court's order for disposal of the property under Sections 452 or 453 cannot affect the finality of the order of acquittal or conviction passed in the main case either by the trial court or by the court of appeal, confirmation or revision.[50]

The appellate court's powers to pass composite orders under Sections 452 to 454 regarding disposal of property came to be explained thus:

> Whether it is an appeal under Section 454 or an appeal against the conviction passed in the judgment in which the disposal order was passed, the court of appeal could notify, alter or annul the order of disposal recorded by the court below and make any further order that may be just.[51]

Where a First Class Magistrate passes an order of acquittal and an order for disposal of property under Section 452, appeal against the order of acquittal will be to the High Court, whereas the appeal against the latter order will be to the Court of Session. In such and similar contingencies, it should be left to the discretion of the superior court concerned, {whether moved by the party or not), to pass appropriate orders with a view to avoiding prejudice to any party till the final disposal of all matters in controversy.[52]

Sub-section (2) of Section 454 gives very wide power to make any further orders that may be just. This would enable the appellate court to give effect to an order setting aside the order of the trial court, if that order has been carried out, by directing the restitution of property.[53]

According to Section 456(3}, where an order has been made under Section 456(1) *{i.e.* passing of an order of restoration of possession), the provisions of Section 454 shall apply in relation thereto as they apply in relation to an order under Section 453. Under Section 454(3), powers referred to in Section 454(2) may be exercised by a court of appeal, confirmation or revision while dealing with the case in which the order referred to in Section 454(1) has been made.[54]

30.19 Destruction of libellous and other matter

Section 455 provides as follows:

Destruction of libellous and other the

> 455. (1) On a conviction under Section 292, Section 293, Sec non 501 or Section 502 of the Indian Penal Code (45 of i860), the Court may order

50. *See,* 41st Report, pp. 339-40, para. 43.19.
51.*Deen Day a l Gupta* v. *State* 0/L[7].P., 1999 Cri Lj 299 (Ail).
52.See, 41st Report, p. 340, para. 43.19.
53. *Hagu Biswas* v. *Manmatha Nath Mitra,* {1914} 15 Cri Lj 184, 185-86: AIR 1914 Ca) 658; *Aranachala Thevan* v, *Vellachami Thevan,* (1923) 24 Cri L] 162, 164: ILR (1922) *46*
54. *rakirbhai Chhaganlal* v. *Ran jit Ratilal,* 1982 Cri Lj 2261,

destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(z) The Court **may,** in like manner, on a conviction under Section 272, Section 273, Section 274 or Section 275 of the Indian Penal Code (45 of i860), order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

Sections 292, 293 referred to above relate to the offences involving sale, etc. of obscene books, etc., Sections 501, 502 relate to sale or printing etc. of defamatory matter concerning high dignitaries like the President or Vice-President of India.

Sections 273, 274, 275 relate to offences involving adulteration of food and drugs and allied matters.

30,20

Pmver to restore possession of immovable property

Power to restore possession of immovable property

In this connection Section 456 provides as follows:

456. {1) When a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the Court that, by such force or show of force or intimidation, any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order that possession of the same be restored to that person after evicting by force, if necessary, any other person who may be in possession of the property:

Provided that no such order shall be made by the Court more than one month after the date of the conviction.

(2) Where the Court trying the offence has not made an order under subsection (1). the Court of appeal, confirmation or revision may, if thinks fit, make such order while disposing of the appeal, reference or revision, as the case may be.

(3) Where an order has been made under sub-section (1), the provisions of Section 454 shall apply in relation thereto as they apply in relation to an order under Section 453.

(4) No order made under this section shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

The powers under this section can be exercised only if two conditions are satisfied: *i)* a person has been convicted of an offence attended by criminal force or show of force or by criminal intimidation; and ***it)*** it appears to the court that, by such force or show of force or intimidation, any person has [55]

55.
Subha

forcible acts;[56] and there is no reason why it should be interpreted in a manner favourable to the criminal.[57]

What the section requires is that the offence of which a person is convicted is attended by criminal force etc. and it is not **necessary** that such criminal force etc. must be an ingredient of the offence.[58]

The expression "criminal force" has been defined in Section 350 IPC; and in rhe light of that definition the criminal force referred to in Section 456 must be with reference to person and not to property.[59] An order for restoration of possession cannot be made under this section where the criminal force attending the dispossession is used not against the person dispossessed, but against the property in his absence.[60] Resistance of the command by the owner to quit the trespassed premises either by threats of injury to the owner even by words of mouth or intimidation or by actual use of criminal force brings the offence of criminal trespass in either of the cases within the expression "attended by criminal force or intimidation or show of force" as occurring in Section 456 of the Code.[61]

However it has also been held that application of criminal force means application of power or strength for a purpose which is criminal in character, regardless of the fact whether it is used against a person or a thing. When the accused effected trespass upon the complainant's house in his absence they clearly committed a crime using violence by breaking open the door and effecting entry thereinto. Under these circumstances it was held that Section 456 was applicable.[62]

The appellate or revislonal court acting under Section 456(2) will have jurisdiction or power to pass the order for restoration of possession at any time but it has to be exercised with discretion within reasonable time of the disposal of the appeal, reference or revision.[63]

56. *Beran Kutty Haji* v.
57. *X. Abdul*
58. *Alakal Senapp*
59. *Xanigo pal Deb* v. *Bhima Char an,* 1956 Cri Lj 214:
60. *As*
61. *Abul Hossain* v.
62. *N. Ab*

65. *H.P. Gupta* v. *Manohar Lai,* (1979) 2 SCC 486: 1979 $CC

Procedure by police upon seizure of property 30.21

Section 457 provides as under:

Procedure by police upon seizure of property

457. (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(z) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit anti if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

The section is applicable only if the following two conditions are satisfied: /) the seizure of property by a police officer is reported to a Magistrate under the provisions of the Code; and *ii)* such property is not produced before a criminal court during an inquiry or trial.

A police officer after taking a search of a person on arrest can, according to Section 51, seize ail articles found on such person. A police officer under Section 102 may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. In case of such seizure the police officer is required forthwith to report the seizure to the Magistrate having jurisdiction. If the fact of seizure is brought to the notice of the Magistrate by any party interested or even, by a party who applies for delivery of the property, it would be sufficient to give jurisdiction to Magistrate to entertain and deal with the application under Section 457M Section 102(3) [a]-[Ao] provides that where the property seized is such that it cannot be conveniently transported to the court, the police officer may give custody thereof to any person on his executing a bond undertaking to produce the property before the court as and when required and to give effect to the further orders of the court as to the disposal of the same.

The report of seizure of property need not necessarily he to a Magistrate competent to hold inquiry or trial of the case in which the property is involved. As it is the report that is made to him of seizure and the fact that the property seized is not produced before court in any inquiry or trial which give him jurisdiction to act under Section 457, the power conferred by that section can be exercised even by a Magistrate who has no power to hold enquiry or trial of the case in which the property is involved. [64] [65] [64] [65]

64. *Krushna Charan Mohanty* v. *State of Orissa.* 1989 Cri Lj 102.5, 1027 (Ori).

65. *P.V. Joseph* v. *State,* 1978 Cri Lj 12,06, 1208 (Ken; *see also,* observations in *Thimoihy v.*

The words "and such property is not produced before the criminal court during inquiry or trial" in Section 457(1) merely refer to the stage of investigation and not the stage of inquiry or trial. These words only mean that the property has not been produced before the Magistrate. Such nonproduction may be on account of 1) absence of any inquiry or trial, or 2) though the enquiry or trial is pending, still the investigating agency has not produced it in the court. The provisions of Section 457 are sufficiently wide so as to cover the case where the Magistrate is called upon to pass an order about disposal or custody of a property during investigation stage of a matter.[66]

The discretion conferred by Section 457(1) on a Magistrate by the words "such order as he thinks fit" is limited to the selection of one of the two alternatives: 1) delivery of the property to the person entitled to the possession thereof, and 2) disposal of it. He has got the widest discretion in the matter of disposal; once he decides to dispose of it, he can dispose of it in any manner he likes. But if he decides to deliver it to a person, he must deliver it to a person entitled to its possession. It may also be noted that a Magistrate is not a civil court and has no power to decide disputes about title.[67] His inquiry is limited to finding as to which person is entitled to the possession.[68] Depending upon the circumstances of the case the court can prefer a registered owner of a motor vehicle for releasing it.[69]

It has been held that the District Collector is not vested with the power to confiscate a vehicle which was used for illegal transportation of sand. The vehicle so confiscated was liable to be returned to the owner on his remitting the amount fixed by the District Collector.[70]

When an order about the custody of the property is to be passed under Section 457, it is the consistent view of the courts that ordinarily after the proceedings are dropped the property should be returned to the person from whose possession it was taken.[71] However this does not mean that the Magistrate must always release such property to the person from

State of Kerala, 1987 Cri Lj 1313 (Ker).

66. *Ghafoor Bhai Nab bit Bkai Tawar v. Motiram Keshaoram Bongirwar,* 1978 Cri Lj 405, 410 (Bom); see also, *P.V. Joseph* v. *State,* 1978 Cri Lj *xz06,* 12,08 (Ker); *Ajai Singh* v. *Nathi Lai,* 1978 Cri Lj 6x9 (All); *Amb'ika Roy* v. *State of* W.B., 1974 Cri LJ IOOI, 1004, 1005 (Cal). The contrary view expressed earlier in *Nanno Mai* v. *S.M. Khan,* 1976 Cri Lj 1783, 1784 (Ail) and *Balaji* v. *State ofA.P.,* 1976 Cri Lj ia[A]r, 1465 (AP), does not seem ro he good law any longer.

67. *S. Abdul Jabbar* v. *Khaleel Ahamed,* 1988 Cri Lj 810 (Kant).

68. *Purshottam Das Banarasidas* v. *State,* 1952 Cri Lj 856: AIR. 1952. All 470; see also, *S. Rajendran* v. K.A.S. *Rama Appaswamy,* 19S2 Cri Lj 86, 88

69. *Gaadhar Baliarsingh* v. *Srinivas Misra,* 1990 Cri Lj 1190 (Ori); bar also see, *Sr ini has Sahu* v.

70. *M oosakoya* v. *State of Kerala,* zoo 6 Cri Lj IZT (Ker).

71. *Brijendra Singh* v. *B.K. Gupta,* 1976 Cri Lj 467 (Ail); see also, *Zafar AH* v. *Tausik Hasan,* X971

whom the property has been recovered, especially when the stage of the case is in suspicion, the investigation is not over and charge sheet has not yet been laid. It would not be correct to say that whenever the claimant asks for the property back he should be given back the said property. That has to be decided on its merits in each case and the discretion of the court has to be exercised after due consideration of the interests of justice including the prospective necessity of the production of the seized articles at the time of trial. If the release of the property seized will, in any manner, affect or prejudice the course of justice at the time of the trial, it will be a wise discretion to reject the claim for return.[72]

Section 457 gives wide discretion to court to pass suitable order for the disposal of the property, or for delivery of such property to the person entitled to the possession thereof subject to such conditions as it may think appropriate, or if there is no such person may pass orders for the custody and production of such property.[73] It has been held that before making an order under this section the affected party should be heard.[74]

In a case where no offence is made out in respect of property seized from the possession of a person, such property should normally be returned to him; but when the court is satisfied that such person had obtained that property by means of any offence, the court will have to decide the question of the right of possession of property and to order the delivery of the property to the person entitled to its possession.[75] Although under Section 457 the court is primarily concerned with the possessory entitlement to the property and not to its ownership, it cannot be stretched to such an extent as to disentitle an owner in possession of the property from which he had been deprived by an unlawful act. Thus simply because a property is found in possession of a thief would not justify the allowance of its retention by him. Instead the possession has to be relegated to the stage when the rightful possessor was so dispossessed by a wrongful and criminal act.[76]

It has been held that once the identity of a person from whose possession property under Section 102. of the Code was seized, was known it should be delivered to him without resorting to the procedure prescribed for proclamation under Section 457(2.) inasmuch as there is presumption under Section no, Evidence Act that possessor of property is its owner unless the contrary is established.[77]

72. *Ram parkasb Sharma* v. *State of Haryana,* {1978) 2 SCC 491: 1978 SCC (Cri.) 309, 310: 1978 Cri Lj 1120.
73. *See*, observations in*Arunachalam* v. *State of Orissa,* 1989 Cri Lj 739 (Or;).
74. *Shy am* M. *Sachdev* v. *State*, 1991 Cri Lj 300 (Del).
75. *Lakshmichand Rajmal* v. *Gopikisan Baimukund, (1936)* 37 Cri Lj 573: AIR *1936* Bom 171; *K. Chinnavadu. re,* (1943) 44 Cri. LJ 168: AIR 1942 Mad 726.
76. 5/jer *Singh* v. *State*, 1981 Cri Lj 1357, 3:3-39 (Del).
77. *Kesbu Lai* v. *State o f Rajasthan*, 1996 Cri Lj 740 (Rai).

In a case wherein after the dispute with regard to the property was settled, the police handed over the property to the complainant whose complaint was found not correct the Rajasthan High Court reiterated that the final disposal of property would be done by the court alone. Police has no such authority. The court therefore following the Supreme Court's ruling in *Basavva Kom Dyamangouda Patil* v. *State of Mysore*[n] ordered the government to pay compensation to the person from whose possession the property was seized.[79]

It has been held that an order passed by an Additional Chief Judicial Magistrate under Section 457 cannot be reviewed by him.[80]

It has been ruled rhat under Section 457 Magistrate does not have power to order return of property seized by customs officials.[81]

30.22 Procedure where no claimant appears within six months

Procedure where no claimant appears within six months

Section 458 provides as follows:

458. (1) If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, the Magistrate may by order direct that such property shall be at the disposal of the State Government and may be sold by that Government and the proceeds of such sale shall be dealt with in such manner as may be prescribed.

(2) An appeal shall lie against any such order to the Court to which appeals ordinarily lie from convictions by the Magistrate.

30.23 Power to sell perishable property

Power to sell perishable property

In this connection Section 459 provides as follows:

459. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than five hundred[82] rupees, the Magistrate may at any time direct it to be sold; and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

The plain reading of the section shows that the concerned Magistrate can exercise the powers which the court has under Sections 457 and 458 under any of the three circumstances, namely, 1) if the person entitled to the possession of such property (that is, seized property) is unknown or absent and the property is subject to speedy and natural decay, 2) if the Magistrate to whom the seizure is reported is of the opinion that the sale

78. {1977) 4 SCC 558: 1977 SCC (Cri) 598: 1977 Cri LJ 1141.
79. *Ganesh* v. *State,* 1988 Cri LJ 475 (Raj).
80. *Bhupinder Singh* v. *State of Haryana,* 1988 Cri Lj 1330 (P&H).
81. *Collector of Customs* v. *Maria Rsge,* 1991 Cri Lj 229 (Gau).
82. *ins.* by Criminal Procedure Code (Amendment) Act, 2005 (w.e.f. 23-6-2006}.

would be for the benefit of the owner; or 3} that the value of the property is less than rupees five hundred. In either of these three circumstances, the Magistrate can utilise the powers vested in him under Sections 457 and 458. The second circumstances, namely, that the sale should be for the benefit of the owner does not depend upon the report of the seizure by the police because that report can be given to the Magistrate by any person under Section 459. Therefore, even the accused, or any other person for that matter, can draw the attention of the Magistrate that the property is seized by the police and that its sale would be for the benefit of the owner. When this is done, it would be open to the Magistrate to take action under Sections 457 and 458 applying their provisions as nearly as may be practicable.[83]

Part VI
Some Assorted Provisions

Service of summons on witness by post

30.24

Service of summons on tininess by post

Section 69 provides as follows:

> 69. (i) Notwithstanding anything contained in the preceding sections of this Chapter, a Court issuing summons to a witness may, in addition to and simul-
> taneously with the issue of such summons, direct a copy of the summons to be served by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain.
>
> (z) When an acknowledgement purporting to be signed by the witness or an endorsement purporting to be made by a postal employee that the witness refused to take delivery of the summons has been received, the Court issuing the summons may declare that the summons has been duly served.

The words "this chapter" mean Chapter VI of the Code containing Sections *61* to 69 relating to "processes to compel appearance". These sections have been discussed earlier in para. 5.3.

The section is primarily intended to avoid delay in the service of summons on witnesses.

Reciprocal arrangements regarding processes

30.25

Reciprocal arrangements regarding processes

In this connection Section 105 provides as follows:

> 105. (r) Where a Court in the territories to which this Code extends (hereafter in this section referred to as the said territories) desires that—
>
> *{a)* a summons to an accused person, or
>
> (b) a warrant for the arrest of an accused person, or
>
> (c) a summons to any person requiring him to attend and produce a docu-
> ment or other thing, or to produce it, or
>
> *{d)* a search warrant,

S3. *Mohar Singh Prem Singh* v. *State, 1979* Cri Lj 2.16, 2.19 (HP).

issued by it shall be served or executed at any place,—

(i) within the local jurisdiction of a court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that court to be served or executed; and where any summons referred to in clause

(a) or clause (c) has been so served, the provisions of Section 68 shall apply in relation to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories,

(ii} in any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters {hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed ro such Court, judge or Magistrate, and sent to such authority for transmission, as the Central Government may, by notification, specify in this behalf.

\2) Where a Court in the said territories has received for service or execution—

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing or to produce it, or

(d) a search warrant,

issued by—

(i) a Court in any State or area in India outside the said territories,

{ii} a Court, Judge or Magistrate in a contracting State, it shall cause the same to be served or executed as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its local jurisdiction; and where—

{:i) a warrant of arrest has been executed, the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by Sections 80 and 8i,

{ii} a search-warrant has been executed, the things found in the search shall, so far as possible, be dealt with in accordance with the procedure prescribed by Section 101.

Provided that in a case where a summons or search-warrant received from a contracting State has been executed, the documents or things produced or things found in the search shall be forwarded to the Court issuing the summons or search-warrant through such authority as the Central Government may, by notification specify in this behalf.[34]

30.26 Forfeiture of certain publications as a precautionary measure and remedies available to person aggrieved by such forfeiture These matters have been covered by Sections 95 and 96 which provide as follows:

84. Proviso ***ins.*** by Criminal Procedure (Amendment} Act **32** of **1988**.

Power to declare certain publications forfeited and to issue sea rch-warrants for the same

95. (i) Where—

(a) any newspaper, or book, or *{b}*

any document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 153~B or Section 292. or Section 293 or Section 295-A of the Indian Penal Code (45 of i860}, the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same

wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In this section and in Section 96,—

{a) "newspaper" and "book" have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867};

(.b) "document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of Section 96.

The prima facie opinion of the government that the offending publication would come within the relevant section of the penal code with its requirement of intent would be adequate here to enable it to act under Section 95(1} of the Code.[85]

Where the notification failed to set out the facts on which the opinion of the State Government was formed, the same was held to be invalid.[86] However, the State Government could publish second notification to cure the technical defects of the first notification.[87]

The notification must set out the grounds on which the State Government has formed a particular opinion. The State Government is required to mention the particular facts, reasons and circumstances upon or on the basis of which it had come to form the opinion.[88]

Application to High Court to set aside declaration of forfeiture

96. (1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under Section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other

85.*Nand Ktshore Singh* v. *State of Bihar,* 1985 Cri Lj 797 (Pat).

86.*Anand Chintamani Dighe* v. *State of Maharashtra,* 2002 Cri LJ *S*

87. *Sujato Bhadra* v. *State ofW.B.,* 2006 Cri Lj 368 (Cal).

88. *Varsha Publications (?) Ltd.* v. *State of Maharashtra,* 1983 Cri Lj 1446, 1449 (Bom): see aiso, *Harnam*

document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (.1) of Section 95.

(a) Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench of the High Court composed of three Judges and where the High Court consists of less than three Judges, such Special Bench shall be composed of all the judges of that High Court.

(3} On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.

{4} The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in sub-section (1) of Section 95, set aside the declaration of forfeiture.

(5) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

The satisfaction of the High Court alone that the offending material does not contain any matter which is punishable under one or other of the relevant Sections specified in Section 95(1 *)(b)* is the conclusive factor in either upholding or quashing the declaration of forfeiture.[89]

By having recourse to the provisions of Section 5, Limitation Act, 1963 [read with S. 2.9(2.) of the Act], the period of limitation prescribed under Section 96(1) can be extended by the High Court in an appropriate case.[90]

Part of Section 95 relating to search-warrants has already been discussed in para. 7.3 dealing with search warrants.

30.27 Delivery to commanding officers of persons liable to be tried by court-martial

Section 475 provides as follows:

Delivery to commanding officers of persons liable to be tried by

475. (1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 *(6z* of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to

the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.

Explanation.—In this section—

(a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company,

(b) "court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.

(z) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situated within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial.

Interpreter to be bound to interpret truthfully

30.28

When the services of an interpreter are required by any criminal court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement. [S. 281]

Public servant concerned in sale not to purchase or bid for property

A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property. [S. 481]

30.29

Duty of High Court to exercise continuous superintendence over courts of Judicial Magistrates

Every High Court shall so exercise superintendence over the courts of judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates. [S. 483]

The section requires supervision of the courts of Judicial Magistrates from time to time to ensure that there is expeditious and proper disposal of cases by the Magistrates. It calls for constant inspection of the subordinate judiciary from time to time.[91]

30.30

PART VII
Irregular Proceedings and Inherent Powers of High Court

Irregularities which do not vitiate proceedings

In this connection Section 460 provides as below:

30.31

91. *Amrik Singh Gandhi* v. *Premier Tyres Ltd.,* 1982 Cri Lj 1723 (Gau).

Irregularities which do not vitiate proceedings

460. If any Magistrate not empowered by law to do any of the following things, namely—
(a) to issue a search-warrant under Section 94;
(b) to order, under Section 155, the police to investigate an offence;
(c) to hold an inquest under Section 176;
(d) to issue process under Section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;
(e) to take cognizance of an offence under clause *(a)* or clause (b) of subsection (1) of Section 190;
(f) to make over a case under sub-section (2) of Section 192;
(g) to tender a pardon under Section 306;
(/?) to recall a case and try it himself under Section 410; or (2) to sell property under Sections 458 or 459,
erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

Some of the clauses in Section 460 have already been considered at appropriate places earlier. However, it is thought desirable to reproduce the entire section in order to give a comprehensive idea of all the clauses together.

30.32 Irregularities which vitiate proceedings

In this connection Section 461 provides as follows:

Irregidarities which vitiate proceedings

461. If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely—
(a) attaches and sells property under Section 83;
(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;
(c) demands security to keep the peace;
(d) demands security for good behaviour;
(e) discharges a person lawfully bound to be of good behaviour;
(/} cancels a bond to keep the peace;
(g) makes an order for maintenance;
(h) makes an order under Section 133 as to a local nuisance;
(*) prohibits, under Section 143, the repetition or continuance of a public nuisance;
(/') makes an order under Part C or Part D of Chapter X;
(k) takes cognizance of an offence under clause (c) of sub-section (1) of Section 190;
(/) tries an offender;
(m) tries an offender summarily;
(n) passes a sentence, under Section 325, on proceedings recorded by another Magistrate;
(o) decides an appeal;
(p) calls, under Section 397, for proceedings; or *(q)* revises an order passed under Section 446,
his proceedings shall be void.

Some of the clauses in Section 461 have already been discussed in earlier discussions. However, the entire section has been reproduced here to give a comprehensive picture of all the clauses.

Defect or error not to make attachment unlawful 3033

No attachment made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, writ of attachment or other proceedings relating thereto. [S. 466]

Finding or sentence when reversible by reason of error, omission or irregularity 3034

The matter has been covered by Section 465 which has been reproduced in earlier para. 7.8(c) and has also been referred to at various places elsewhere. The section is not being reproduced once again. However, the observations of the Supreme Court in this connection are worth quoting. The court has observed:

> The Code of Criminal Procedure is essentially a code of procedure and like all procedural law, is designed to further the ends of justice and not to frustrate them by introduction of endless technicalities. At the same time it has to be borne in mind that it is procedure that spells much of the difference between rule of law and rule by whim and caprice. The object of the Code is to ensure for the accused a full and fair trial in accordance with the principles of natural justice. If there be substantial compliance with the requirements of law', a mere procedural irregularity would not vitiate the trial unless the same results in miscarriage of justice. In all procedural law[r]s certain things are vital. Disregard of the provisions in respect of them would prove fatal to the trial and would invalidate the conviction. There are, how-ever, other requirements which are not so vital. Non-compliance -with them would amount to an irregularity which would be curable unless it has resulted in a failure of justice.[92] [93]

Saving of inherent power of High Court 3035

Nothing in this Code shall be deemed to limit or affect the inherent pow-ers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of **any** court or otherwise to secure the ends of justice. [S. 482]

The section was considered earlier in Chapter 1 *{supra)*[9]* and at several other places.

This section makes it clear that the provisions of the Code are not intended to limit or affect the inherent powers of the High Courts.

92. *Iqbal Ismail Sodawala* v. *State of Maharashtra,* (1975) 3 SCC 140: 1974 SCC (Cri) 764, 772.: 1974 Cri LJ 12.91. 13.05

Obviously the inherent power can be exercised only for either of the three purposes specifically mentioned in the section. This inherent power cannot naturally be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provision of the Code that Section 482 can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section. In prescribing rules of procedure legislature undoubtedly attempts to provide for all cases that are likely to arise; but it is not possible that any legislative enactment dealing with the procedure, however carefully it may be drafted, would succeed in providing for all cases that may possibly arise in future. Lacunae are sometimes discovered in procedural law and it is to cover such lacunae and to deal with cases where such lacunae are discovered that procedural law invariably recognises the existence of inherent power in courts. It would be noticed that it is only the High Court whose inherent power has been recognised by Section 482, and even in regard to the High Court's inherent power definite salutary safeguards have been laid down as to its exercise. It is only where the High Court is satisfied either that an order passed under the Code would be rendered ineffective or that the process of any court would be abused or that the ends of justice would not be secured that the High Court can and must exercise its inherent powers under Section 482 of the Code.[94] It is neither possible nor desirable to lay down any indexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise.[95] It has been held that Section 482 cannot be invoked in non-criminal proceedings such as those under the Customs Act.[96]

"Inherent jurisdiction" "to prevent abuse of process" "to secure the ends of justice" are terms incapable of definition or enumeration, and capable at the most of test, according to well established principles of criminal jurisprudence. "Process" is a general word meaning in effect anything done by the court. The framers of the Code could not have provided which all cases should be covered as abuse of the process or court. It is for the court to take a decision in particular cases.[97]

94. *Tal*

95. See, *Stnte of Orissa* v. *Saroj* Kumar *Sahoo,* (2005) 13 S CO 540:

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The inherent power contemplated by Section 482 has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself.[1]

The Supreme Court has reiterated the nature of this power thus:

> The power conferred on the High Court under Articles 226 and 227 of the Constitution and under Section 482 of the Code have no limits but more the power more due care and caution is to be exercised while invoking these powers. When the exercise of powers could be under Article 227 or Section 482 of the Code it may not always be necessary to invoke the provisions of Article 226. Some of the decisions of this Court laying down principles for the exercise of powers by the High Court under Articles 226 and 227 may be referred to.[2]

The following cases {summarised) have been stated by the Supreme Court,[3] by way of illustration wherein the extraordinary power under Article 226 or inherent power under Section 482 can be exercised by the High Court to prevent abuse of process of any court or to secure justice.

1. Where the allegations in the FIR/complaint, even if they are taken at their face value do not prima facie constitute any offence against the accused.
2. Where the allegations in the FIR or other materials do not constitute a cognizable offence justifying an investigation by the police under Section 156(1) of the code except under an order of a Magistrate within the purview of Section 155(2).
3. Where the uncontroverted allegations in the FIR/complaint and the evidence collected thereon do not disclose the commission of any offence.
4. W7here the allegations in the FIR/complaint do not constitute any cognizable offence but constitute only non-cognizable offence to which no investigation is permitted by the police without the order of Magistrate under Section 155(2}.
5. WTere the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
6. Where there is an express legal bar engrafted in any of the provisions of the Code or the Statute concerned (under which the proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or in the statute concerned, providing efficacious redress for the grievance of the aggrieved party.

1. *Talab Haji Hussain* v. *Madhukar Iurshotla?n*
2. *Pepsi Poods Ltd.* v. *judicial Magistrate,* {1998) 5 SCC 749, 758: 1998 SCO (Cri) 1400; see also, *Simrikhia* v. *Dailey Mukherjee,*
3. *State of Haryana* v. *Bhajan* .Lai, 1992 Supp (1) SCC 335: 1992 SCC (Cri) 527. These have been abridged and presented here.

7. Where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused with a view to spite him due to private and personal vengeance.

The courts have been following these in dealing with requests for quashing criminal proceedings.

The following principles in relation to the exercise of the inherent power of the High Court have been followed ordinarily and generally, almost invariably, barring a few exceptions:

1. that the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;
2. that it should be exercised very sparingly to prevent abuse of process of any court or otherwise to secure the ends of justice;
3. that it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

In most of the cases decided during several decades the inherent power of the High Court has been invoked for the quashing of a criminal proceeding on one ground or the other.[4]

In *R.P. Kapur* v. *State of Punjab*[5], the Supreme Court considered the circumstances in which the High Court can, by invoking its inherent powers, quash the criminal proceedings in a subordinate criminal court. The Supreme Court observed:

> It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be cried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is legal bar against the institution or continuance of the

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said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced dearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and dearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under [S. 482] the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to Invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under [$. 482] in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point.[6 7]

The law stated above is not affected by Section 397(2) of the new Code of 1973. It still holds good in accordance with Section 4827 It is the Inadequacy inherent in the Code which fails to provide for all contingencies which has called for the creation of and saving the inherent power of the High Court to act *ex debito justitiae.* The same also explains why the inherent power is not to be exercised in matters specially covered by the other provisions of the Code. Therefore it is important to note that the specific bar put by Section 397(2) on the exercise of revisional jurisdiction In case of interlocutory orders has changed the context of the use of inherent powers of the High Court. There is nothing in Section 482 that is to be read subject to Section 397(2). However, the High Court is not to take recourse to its inherent powers whenever it is unable to exercise its revisional powers in cases of interlocutory orders. Indiscriminate or

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frequent use of the inherent power in this area of interlocutory orders would obviously render nugatory the bar put by Section 397(2,}. That would be doing indirectly what the court is directly forbidden to do under Section 397(2). While it would not be proper to fetter or circumscribe the ambit of the inherent powers of the High Court which is a mighty reservoir to be drawn by the litigants in cases where the channels of other legal remedies under the Code are dried up, at the same time it would be inadvisable to expand its ambit possibly except in rare cases to spheres specifically sought to be excluded by the Code. It would be risky to attempt formulations of principles to be followed in this regard. Circumstances may arise where failure to exercise the inherent powers in case of interlocutory orders may occasion great hardship. To inhibit or deny the High Court's power to provide remedies on such occasion may cause injustice for the removal of which alone the court exists.[8] This position has made the Supreme Court to observe thus:

> ... though the revision before the High Court under sub-section (1} of Section 397 is prohibited by sub-section (3) thereof, the inherent power of the High Court is still available under Section 482 of the Code and as it is paramount power of continuous superintendence of the High Court under Section 483, the High Court is justified in interfering with the orders leading to miscarriage of justice ... .[9]

Relief under Section 482 is not barred by any limitation since the power is conferred to secure the ends of justice. Hence the mere fact that revision petition was hied at a belated stage cannot provide legality to an order which is patently illegal or suffers from the abuse of process of court.[10]

The High Court can in the exercise of its inherent jurisdiction expunge remarks made by it or by a lower court in respect of any conduct of a person or official if it be necessary to do so to prevent abuse of the process of the court or otherwise to secure the ends of justice; the jurisdiction is however of an exceptional nature and has to be exercised in exceptional cases only.[11]

8. *Bisiuanaih Agarwalla* v. *Stats,* 1976 Cri Lj 1901, 1903 (Cal); *Madhu Lira aye*

9. *Krisbnan* v .

10. *Enforcement Directo rate* v. *A jay*

1 L *State of U.P.* v. *M oh si. Nairn,* (:t 9 6 4) r Cri LJ 549, 558: AIR 1964 SC 703; *Ragbubir Satan* v. *State of Bihar,* (1964) 1 Cri IJ r,

In considering the expunction of disparaging remarks against persons or authorities the High Court will take into account:

(d whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself;

ii) whether there is evidence on record bearing on that conduct justifying the remarks; and

{Hi) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct.

The Rajasthan High Court ruled that an order made in the absence of a party without hearing him, when such order has been passed on merits and adversely affecting his rights could be recalled in exercise of inherent powers under Section 482. However the question in each case would be as to whether such a principle applies to the facts of a given case or not.[12]

The Supreme Court has clarified that Section 482 could be invoked to award cost.[13] Its observations are instructive:

In the result, we hold that while exercising inherent jurisdiction under Section 482, the Court has power to pass 'such orders' (not inconsistent with any provision of the Code) including the order for costs in appropriate cases *(s)* to give effect to any order passed under the Code, or *lii)* to prevent abuse of the process of any court, or *{in)* otherwise to secure the ends of justice. As stated above, this extraordinary power is to be used in extraordinary circumstances and in a judicious manner. Costs may be to meet the litigation expenses or can be exemplary to achieve the aforesaid purposes.[14] It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve.[15]

It has been categorically declared by the Supreme Court that the subordinate courts do not have inherent powers.[16] [17] It has at the same time, explained the vitality of High Court's inherent powers while locating its own plenary and residuary powers in Article 136 of the Constitution.[18] It observed:

12. *Civil Supplies Deptt.* v. *Vimal Kwnar,* 1999 Cri LJ 1521 {Raj}.
13. *Mary Angel* v. *State ofT.N{1999}* 5 SCO 209: 1999 SCC (Cri) 1296; 1999 Cri LJ 3513.
14. *Ibid,* 3521.
15. *R.K. Lakshmanan* v. *A.K. Srinivasan.* {1975} 2 SCC 466: T975 SCC (Cri) 654. 657-58: 1975 Cri Lj 1545; *State of U.P.* v. *Mohd. Naim,* (1964} :i Cri LJ 549, 558: AIR 1964 SC 703; *State* v. *N.C.Jain,* 1978 Cri Lj 1340 (All); S.K. *Viswambaran* v. *E. Kayakunju,* {1987) 2 SCC -09: 1987 SCC (Cri) 289: 1987 Cri Lj
16. A.S. *Gauraya* v. *S.N. Thakur,* (1986) 2 SCC '709: 19S6 SCC ((Cri) 249: 1986 Cri Lj 1074; *but see,* observations of the Supreme Court in *Mimt Kumar* ***1*** v. *State of Bihar, (20O6}* 4 SCC 359: {2006} 2 SCC (Cri) 310, 316: 2006 Cri LJ 2468. Also see, *CBI* v.
17. *Delhi Judicial Service Assn. v. State of Gujarat,* (1991} 4 SCC 4O6: 1991 Cri Lj 2086

> ... though there is no provision like Section 48z of the Criminal Procedure Code conferring express power on this Court to quest or set aside any criminal proceedings pending before a criminal court to prevent abuse of process of the court, but this Court has power to quash any such proceedings in exercise of its plenary and residuary power under Article 136 of the
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18. *Ibid,* 461.

Probing the Problems

Chapter 1

OBJECT, EXTENT AND SCOPE

1. Consider the impact of Sections 4(2) and 5 in the context of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and examine the following decisions:

(a) *Bhura Lai* v. *State*, 1999 Cri LJ 3552 {Raj}

(b) *Referring Officer* v. *Police Station, Khammam*, **1999 Cri LJ 4173 (AP)**

2. Consider the decision in *Republic of Italy* v. *Union of India*, (2013) 4 SCC 721: (2013} 2 SCC (Cri) 905.

Chapter 2

CONSTITUTION OF CRIMINAL COURTS

1. Examine *Ponnuswamy* v. L. *Guruswamy*, 1999 Cri LJ 2353 (Mad).

2. Examine whether the functioning of a sitting judge as an inquiry commission is violative of Article 50 of the Constitution.

3. Consider the desirability of simultaneously ordering registration of an FIR and a judicial inquiry by a sitting judge of the Fligh Court in a case. Will the investigation be free, fair and just?

Chapter 3

POLICE, PROSECUTORS, DEFENCE COUNSELS, PRISON AUTHORITIES

1. Examine whether the machinery of criminal justice administration needs any change.

2. Under our system the victim of a crime can appoint a counsel. Examine the role he can play in the trial. Refer to case law. Read Section 301. *Shiv Kumar* v. *Hukam Chand,* (1999) 7 SCC 467: 1999 SCC (Cri) 1277.

3. Review the role played by Defence Counsels in criminal trials. Refer to Section 145, Evidence Act.

4. Consider T.C. *Mathai* v. *District & Sessions Judge, Thiruvananthapuram,* (1999) 3 SCC 614: 1999 SCC (Cri) 455: 1999 Cri Lj 2092.

5. Review the appointment procedure of Public Prosecutors.

6. What is the role of Public Prosecutor in investigation?

7. Examine *Sunil Kumar Pal* v. *Pbota* Sheikh(1984) 4 SCC 533: 1985 SCC (Cri) 18: AIR 1984 SC 1591.

8. Read Dr K.N.C. Pillai: "Public Prosecutor in India", 1998 Cu LR 380.

Chapter 4

PRE-TRIAL PROCEEDINGS—GENERAL OBSERVATIONS

1. The Kerala High Court in *K. Ramakrishnan* v. *State of Kerala,* AIR 1999 Ker 385 instructed the District Magistrates to declare smoking in public places as public nuisance [under S. *268* IPC] so as to enable the police to arrest the violators as accused under Section 188 IPC which is a cognizable offence.

Since "smoking in public places will vitiate the atmosphere so as to make it noxious to the health", it is an offence under Section 278 IPC. It is in this context that the Division Bench ruled as above. Later the Supreme Court also upheld this view.

Examine whether there was any other way for the court to ban smoking at public places.

2. Does a person who has information/knowledge about commission of an offence has any remedy, if the police does not examine? Refer to *Jakia Nasim Ahesan* v. *State of Gujarat,* (2009) 17 SCC 6x5: (2011) 1 SCC (Cri) 1095.

Chapter 5

PRE-TRIAL PROCEDURE: STEPS TO ENSURE ACCUSED'S PRESENCE AT THE TRIAL

1. Examine *D.K. Basu* v. *State of W.B.,* (1997) *6 SCC* 642: 1997 Cri Lj 3525 discussed in detail in Chapter *6 infra* and *Delhi judicial Services Assn,* v. *State of Gujarat,* (1991) 4 SCC 406: 1991 Cri Lj 3086 discussed in this chapter. Are these instructions complied within letter and spirit?

If not, identify the reasons therefor. Suggest ways and means to improve the situation.

z. The Supreme Court has banned indiscriminate handcuffing by the police. But see GX. *Gupta* v. *R.K. Sharma,* 1999 SCC (Cri) 1150: AIR 2000 SC 3632 wherein the Supreme Court came across with the instance of violation of its rulings. Suggest ways and means to ensure compliance of the courts' instructions.

3. Critically examine *Deepak Mishra* v. *State of U. P.* 1999 Cri LJ 4123 (All).

4. Critically examine *TGN Kumar* v. *State of Kerala,* (2011) 2 SCC 772: (2011) 1 SCC (Cri) 893.

5. Critically examine *Nandini Satpatbi* v. P.L. Dani, (1978) 2 SCC 424 on participation of accused's lawyer during interrogation and review. *Directorate of Revenue Intelligence* v. *Jugal Kishore Samra,* (2011) 12 SCC 362: (2012) 1 SCC (Cri) 573; D. K. *Basu,* (1997) 6 SCC 642: 1997 Cri LJ 3525 and *Mohd. Ajmal Amir Kasab* v. Sta£<? *of Maharashtra,* (2012) 9 SCC 1: (2012) 3 SCC (Cri) 481: 2012 Cri Lj 4770. Bring out the present position of law.

Chapter 6

PRE-TRIAL PROCEDURE: ARREST, AND THE RIGHTS OF THE ARRESTED PERSON

1. It is often suggested that in order to avoid police torture the police force should be bifurcated into two wings—the law and order wing and the criminal investigation wing. Persons with integrity and aptitude for investigation alone should be recruited to the latter wing. Do you think this arrangement would improve police efficiency and avoid torture?

If the latter wing is brought under the charge of the Assistant Public Prosecutors (APP)/Public Prosecutor (PP) will it improve the situation? Consider the different possibilities for assuring maximum protection both to the individuals and society.

2. Consider the efficacy of compensation for violation of rights.

3. Examine the impact of human rights documents made on the criminal justice system.

4. Read Santosh Paul: "Right to Counsel", (1997) 8 SCC J-14.

Chapter 7

PRE-TRIAL PROCEDURE: SEARCH, SEIZURE AND PRODUCTION OF MATERIALS

1. Examine whether a vehicle purchased on hire purchase basis could be seized under Section 94 when as a result of dispute

between the financier and the purchaser the vehicle was taken over by the financier.

z. Consider the impact the Supreme Court's decision in *State of Maharashtra* v. *Tapas D. Neogy,* {1999} 7 SCC 685: 1999 SCC (Cri) 1352: 1999 Cri LJ 4305 will have on banking business. How can the police determine the links between the commission of crimes and the deposit in the bank? Examine.

3. What is the reason for the Code not giving police the benefit of a warrant for general search for the purpose of investigation?

4. Examine the implications of Sections 165 and 102 in the light of International Bill of Rights.

5. Read J.K. Mathur j: "Illegal search and arrest—Its effect on trial", (1997) *6* SCC J-12.

Chapter 8

PRE-TRIAL PROCEDURE: INVESTIGATION BY POLICE

1. Analyse the following facts and offer your suggestions for solution. An offence was committed in 198b. The final report by the police was however submitted only in 1997. The Magistrate took cognizance and Sessions Court framed charges. There were some contradictions in the investigation report on the materials gathered. Could the prosecution be quashed by the High Court in exercise of its powers under Section 482?

2. During the course of investigation an accused prays for staying arrest. Examine whether his prayer could be acceded to.

3. The Allahabad High Court in *Udaybhan Shuki* v. *State of U. P.*, 1999 Cri LJ 274 (All) observed:

> Section 156(3} CrPC empowers the Chief Judicial Magistrate to order an investigation as is thought of under Section 156(1), CrPC, that is, in respect of a cognizable case. This power of the Court may be delegated to the police for making a preliminary enquiry and only thereafter to start an investigation. That part of the order of the Chief Judicial Magistrate must be deemed to be beyond his powers under Section 156(3}, CrPC.

Analyse in the light of case law.

4. Examine whether the Defence Counsel or the Public Prosecutor could have any role in investigation by the police.

5. In 1974 police killed an extremist in an encounter. He was accused of several political murders. After 30 years a person who witnessed the killing of the person deposed before an Inquiry Commission (appointed to inquire into the circumstances in which he was killed) that's in fact the victim surrendered before the police and that he was shot dead when he placed his rifle on the ground.

The Magistrate before whom a petition was moved to register the case registered it and ordered investigation. Examine whether the Magistrate's order is right.

6. A girl below fifteen was raped by *A.* She became pregnant but did not complain to the police. On her delivering a baby girl her neighbour filed a complaint in the court of Magistrate. Examine whether the Magistrate can initiate action to bring the offender to book.

7. Critically examine the role of Magistrate in investigation into crimes by the police.

8. Examine *Samaj Parivartan Samudaya* v. *State of Karnataka,* (2012) 7 SCC 407: (2012) 7 SCC (Cri) 365.

9. Examine *State of Maharashtra* v. *Sarangdharsingh Shivdassingh Chavan,* {2011) 1 SCC 577: (2011) 1 SCC (Cri) 477.

10. Analyse *Dayal Singh* v. *State of Uttaranchal,* (2012) 8 SCC 263: {2012) 3 SCC (Cri) 838: 2012 Cri LJ 4323, and *Nagesh* v. *State of Karnataka,* (2012) 6 SCC 477: (2012} 3 SCC (Cri) 168: 2012 Cri LJ 2927.

11. Critically examine the position that investigation is the prerogative of the police. Evaluate the role assigned to the magistrate under the Code. Also examine the role played by the appellate courts in investigation.

Chapter 9

LOCAL JURISDICTION OF THE COURTS AND THE POLICE

1. Examine the implications of Sections 185 and 187 and the role of the High Courts in deciding the place of inquiry or trial.

2. Analyse the decision in *Mohd. Sajeed K* v. *State of Kerala,* 1995 Cri LJ 33^{T}3 (^{A}e^{T})- Examine what impact will it have on investigations into crimes committed by Indians abroad.

3. Consider *Satvinder Kattrv. State (Govt. ofNCT of Delhi),* (1999} 8 SCC 728: 1999 SCC (Cri) 1503.

4. Examine Section 177 and the reasoning in *K. Bhaskaran* v. *Sankaran Vaidhyan Balan,* (1999} 7 SCC 510: 1999 SCC (Cri) 1284.

Chapter 10

COGNIZANCE OF OFFENCES

1. Examine whether it is not necessary that a suspect who is on anticipatory bail is heard at the time when the final report is considered by the court for taking cognizance.

2. Examine the scope of Section 465 in the light of case law.

3. Consider Sections 195 and 196 and bring out the principles underlying them.

4. Analyse Section 197 in the light of case law produced by the Supreme Court.

5. **Examine the reasoning in** *State of Orissa* **v.** *Mrutunjaya Panda,* (1998) 2 SCC 414: 1998 SCC (Cri) 644.

Chapter 11

COMMENCEMENT OE PROCEEDINGS BEFORE MAGISTRATES

1. Critically examine the purpose of the proviso to Section 202,(2,) in the light of *Rosy* v. *State of Kerala, (2000) 2* SCC 230: 2000 SCC {Cri) 379

2. Consider whether it is necessary to hear the accused before the Magistrate decides to issue process.

3. Critically examine M.P. *Srivastava* v, *Sqn. Ldr. K.V. Vashist,* 1991 Cri LJ 12 (Del).

4. Examine *Ibrahim Khan* v. *State,* 1999 Cri Lj *2614* (Raj) and *Hardyal Prem* v. *State of Rajasthan,* 1991 Supp (1) SCC 148: 1991 Cri Lj 345.

Chapter 12

BAIL

1. Read *Gurbaksh Singh Sibbia* v. *State of Punjab,* {1980) 2 SCC 565: 1980 SCC (Cri) 465: 1980 Cri LJ 1125; *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra,* (1996) 1 SCC *6 6 j :* 1996 SCC (Cri) 198: 1996 Cri LJ 1368; *K.L. Verma* v. *State,* (1998) 9 SCC 348: 1998 SCC (Cri) 1031; *Vinod Kumar* v. *State of M.P.,,* 1999 Cri Lj 4364: (1998} 2 MPLJ 689; *Natturasu* v. *State,* 1998 Cri LJ 1762 (Mad) and *C.H. Siva Prasad* v. *State of A.P.,* 1999 Cri LJ 1263 (AP) and find out the duration of an order granting anticipatory bail.

2. Consider *Arun Kumar Singh* v. *State (NCT of Delhi),* 1999 Cri LJ 4021 (Del) and identify its principle.

3. What is the precedential value of a judgment rendered by a smaller Bench of the Supreme Court interpreting a decision of a larger Bench in the matter of granting bail. Consider in the context of *Gurbaksh Singh* and *Salauddin case.*

4. Consider the impact of the decision in *Raj Deo Sharma (2)* v. *State of Bihar,* (1999} 7 SCC 604: 1999 SCC (Cri) 1324 the provisions governing grant of bail.

5. Examine the principle of parity in granting bail.

6. Critically examine the impact of *R. Rathinam* v. *State,* (2000) 2 SCC 391: 2000 SCC (Cri) 958 on law of bail.

7. Consider the hierarchy of courts in the context of dealing with bail applications.

Chapter 13

TRIAL PROCEDURES: PRINCIPAL FEATURES OF FAIR TRIAL

1. Examine the relevance of *Raj Deo Sharma* v. *State of Bihar*, (1998) 7 SCC 507: 1998 SCC (Cri) 1692 to the concept of fair trial.

2. Consider the role of the presiding officer in criminal trials—Refer to Sections 145 and 165, Evidence Act.

3. Read T.C. *Mathai* v. *District and Sessions Judges, Thiruvananthapuram*, (1999) 3 SCC 614: 1999 SCC (Cri) 455: 1999 Cri LJ 2092 and examine the reasoning.

4. Analyse Article 20(2) of the Constitution and Section 300 CrPC and examine whether we have the right against double jeopardy.

5. Examine the International Covenant on Civil and Political Rights and see whether our Code incorporates the fundamental principles of fair trial.

6. Critically examine the relevance and importance of right to counsel.

7. Critically examine *V.K. Sasikala* v. *State*, (2012) 9 SCC 771: (2013) 1 SCC (Cri) 1010: 2013 Cri LJ 177.

8. Prof. K.N.C. Pillai, "Speedy trial—The rise and fall of a right", (2012) 10 SCC J-39.

Chapter 14

TRIAL PROCEDURES: COURTS AND PARTIES

1. Examine whether the victim's right to have a lawyer is accepted and allowed to be enforced in india.

2. Gather the details of various legal aid schemes—government sponsored and others and examine how far they have been successful.

3. Examine in the light of Article 50 of the Constitution whether it is proper for a sitting judge to accept the assignment for conducting administrative investigations in india.

4. Consider the legislative practice of entrusting the enforcement of certain legislation with Special Courts presided over by an officer of the rank of Sessions Judges.

5. Ponder over the suggestions made for protecting the witnesses.

6. Examine Article 39-A of the Constitution of India and Legal Services Authorities Act, 1987. Do you think the machinery established under this Act is effective?

Chapter 15

TRIAL PROCEDURES: CHARGE

1. Consider the relevance and importance of Section 464 in the light of concept of fair trial. Refer to the Supreme Court's reiteration of

principles on which Section 464 is applied: *Kammari Brahmaiah* v. *Public Prosecutor,* (1999) 2 SCC 522: 1999 SCC (Cri) 281.

2. Examine whether our courts in fact frame charges in criminal cases investigated by the police.

3. Examine whether an additional charge could be framed at the stage of cross examination of the complainant in a case where the court did not inquire into the facts that give rise to the prima facie case of the additional charge.

Chapter 16

TRIAL PROCEDURES: SOME COMMON FEATURES

1. Review the procedure envisaged by the Code for ensuring trial and punishment of persons accused of offences against public justice.

2. Examine whether it is necessary to insist on submission of memorandum of arguments.

3. Examine the case law produced under Section 313, and identify the purpose served by the accused's statement.

4. Review the cases decided under Section 319 and 193.

5. Review the decisions under Section 311 and examine the role of the court in criminal trials.

Chapter 17

TRIAL PROCEDURES: DISPOSAL OF CRIMINAL CASES WITHOUT FULL TRIAL

1. Examine the scheme envisaged by the Code for effecting compounding of offences and identify the reasons for High Court invoking Section 482 to extend the scope of compounding.

2. Review the different aspects of withdrawal of prosecutions in the light of case law.

3. Have a look into Sections 306, 307 and 308 and consider whether they require any revision.

4. Examine *State of H.P.* v. *Surinder Mohan,* (2000) 2 SCC 396': 2000 SCC (Cri) 400.

5. Consider the trend of exercising writ power in criminal prosecutions by the High Courts.

6. Examine the scheme for plea-bargaining. Do you think the legislation in India is effective?

Chapter 18

TRIAL PROCEDURES: PRELIMINARY PLEAS TO BAR TRIAL

1. Examine the purpose of the law of limitation and the need for safeguarding "interest of justice".

2. The Supreme Court and High Courts have in several cases ordered closure of prosecution on the finding of violation of speedy trial right. [See for example, *Heera Ram Sirvi* v. *State of Rajasthan,* 1999 Cri LJ 877 {Raj); *Jagdisb Chandra* v. *State of Rajasthan,* 1999 Cri LJ 1090 (Raj)]. In *Raj Deo Sharma* v. *State of Bihar,* {1998) 7 SCC 507: 1998 SCC {Cri) 1692. the Supreme Court ruled that delay beyond two years in cases involving offences punishable up to seven years' imprisonment should not be put up with and the case should be closed. Likewise in the case of offences punishable with more than seven years' imprisonment, delay of three years and more for trial should make the court to close the case. Compare this position with the one relating to the law of limitation and examine whether the purpose served by both are the same.

3. Compare Article 2.0(2.) of the Constitution and Section 300 of the Code. Examine its application in cases under special statutes like Customs Act, FERA, etc. Read K.N.C. Pillai, *Double Jeopardy Protection: A Comparative Overview* (1987).

4. Critically examine *State of H.P.* v. *Tara Dutt,* (2000) 1 SCC 2.30: 2000 SCC (Cri) 125.

5. Critically examine Sarah Mathew v. *Institute of Cardio Vascular Diseases,* (2014} 2 SCC *6z.*

Chapter 19

TRIAL PROCEDURES: TRIAL BEFORE A COURT OF SESSION

1. Examine whether it is possible for the Sessions Judge to order trial in a case where the accused's lawyer entered a plea of guilty but the accused denies having made such a plea through his lawyer.

2. Discuss whether it is appropriate to insist for written memorandum of arguments at the stage of trial referred to in Section 232.

3. Examine whether it is desirable to make it obligatory on the part of the accused to put in a written statement of arguments in his defence under Section 234. Consider whether it is necessary to give a chance to the prosecutor to sum up his case at this stage.

4. Critically examine the implications of the decision in *Santa Singh* v. *State of Punjab, {1976)* 4 SCC 190: 1976 SCC (Cri) 54 *6: 1976* Cri LJ 1875 giving a wider meaning to the word "hear" under Section 235(2).

Chapter 20

TRIAL PROCEDURES: TRIAL OF WARRANT CASES BY MAGISTRATES

1. Critically examine the power of the Magistrate under Section 243(2) to summon a witness at the instance Gf the accused.

Problems

2. Analyse the Magistrate's power under Sections 277 to 279 and show how these provisions help the court to reach at the truth.

3. Examine whether the Magistrate can discharge an accused under Section 245(2} in a case without recording reasons if he feels that the charges are groundless.

4. Examine how far Section 248(2) is helpful in individualising punishment.

5. Critically examine the reference of Section 250 in the light of case law.

Chapter 21

TRIAL PROCEDURES: TRIAL OF SUMMONS CASES AND SUMMARY TRIAL

1. Examine the implications of the words "if the Magistrate is satisfied that the accused would not be prejudiced thereby" in Section ^55(3)-

2. Critically examine the provision in Section 258 which enables a court to pass a judgment of acquittal. How is it different from an order ot discharge?

3. Examine the reasoning in *Ram Loch an* v. *State,* 1978 Cri LJ 544 (All) and *Jagmalaram* v. *State of Rajasthan,* 1982 Cri Lj 2314 (Raj).

Chapter 22

TRIAL PROCEDURES: SPECIAL RULES OF EVIDENCE

1. Examine the rationale of Section 292.

2. Critically examine why neither the accused nor the prosecution has been given the right to insist upon the presence of the officers referred to in Section 293 in the court for cross-examination.

3. Examine the amendments made to the Code in 2005 and 2006 with regard to collection of evidence at pre-trial and trial stages.

Chapter 23

JUDGMENT

r. Read Sections 18 and 19, Probation of Offenders Act, 1958 and examine whether Sections 3 and 4 of it could co-exist with Section 360 CrPC. *Also read,* Section 8(1), General Clauses Act. Refer to *Gurbachan Singh* v. *State of Punjab,* 1980 Cri LJ 417 (P&H) and *State of Kerala* v. *Chellappan George*. 1983 Cri Lj 1780: 1983 KLT 811.

2. Examine the various provisions in the CrPC that help the court to identify the sentence appropriate to the personality of the offender.

3. Compare the provisions in the Probation of Offenders Act. 1958 and Sections 360 and 361 CrPC. Which provisions according to you are more helpful to the court in sentencing the offender with the aim of achieving rehabilitation.

4. Examine the importance of the inquiry under Section 367.

5. Critically examine the salient features of a judgment. Refer to the statutory provisions.

6. Judgment is described to be a discourse on the *Us* before the court. It is rightly explained as dialogue between the court and the society. Having regard to this understanding do you think the judgment of our courts are successful in offering convincing conclusions?

7. Critically examine *Ankush Shtvaji Gaikwad* v. *State of Maharashtra,* (2013) *6* SCC 770.

Chapter 24

REVIEW PROCEDURES: APPEALS

1. Examine why in certain cases the Criminal Procedure Code does not provide for appeals.

2. Consider why the scope for appealing against acquittal is limited.

3. Examine impact invocation of writ jurisdiction and jurisdiction under Section 482 has had on the provisions governing appellate power of the High Court.

4. Critically examine the provisions on summary disposal of appeals. Consider the need for adducing reasons in the appellate judgments.

5. Collect details of jail appeals from the High Court and examine how far they have been successful.

6. Examine the efficacy of Section 391. Refer to case law.

7. Critically examine the powers of the High Court in dealing with appeals. Refer to provisions dealing with grant of bail in pending appeals as dealt within Chapter 12.

8. Critically examine the scheme for making appeals for the enhancement of sentence.

9. Critically examine the practice of the Supreme Court in assuming appellate powers while exercising power under Article 136 of the Constitution in criminal cases.

10. Review the role of district courts in criminal justice administration in the context of constitutionalisation of issues.

Chapter 25

REVIEW PROCEDURES: REVISION

1. Have a survey of cases decided under the appellate and revisional jurisdictions and bring out the differences between the appellate jurisdiction and revisional jurisdiction.

2. Examine the rationale of Section 401(5} CrPC.

3. Examine the purposes served by Article 228 of the Constitution and Section 395 CrPC.

4. Consider the provisions enabling party interested in getting a sentence enhanced by the High Court.

5. Examine the provisions in the NDPS Act and TADA and show how far these provisions eroded the revisional powers of the High Court.

Chapter 26

TRANSFER OF CASES

1. Critically examine the procedure for getting a case transferred from a criminal court to another criminal court.

2. Consider the grounds on which restrictions are imposed on transfer of cases.

3. Examine the power of the Supreme Court in transferring criminal cases.

4. Consider whether the Supreme Court decision in *Satvinder Kaur* v. *State (Govt, of NCT of Delhi),* {1959) 8 SCC 728: 1999 SCC (Cri) 1503 would have any impact on power for transfer of cases.

5. Consider *Zahira Habibullah Sheikh* v. *State of Gttjarat,* {2005) 4 SCC 292: 2005 SCC (Cri) 931.

Chapter 27

EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

1. Read Balwant Singh Malik, "The Law of Punishments of Transportation for Life and Imprisonment for Life—A Critical Appraisal", (1999) 5 SCC j'4 and examine whether we need to have a relook of the decisions.

2. Examine Sections 427 and 428 and try to identify the legislative policy behind them.

3. Critically analyse the role assigned to the appropriate government in execution of sentences.

4. Consider why the Supreme Court excluded the remissions granted under Articles 72 and 161 of the Constitution from the purview of Section 433-A.

5. Examine the reasons for the enactment of Section 433-A CrPC. Review the case law produced by various High Courts in India on the application of Section 433-A.

Chapter 28

PREVENTIVE AND PRECAUTIONARY MEASURES

i. Collect the statutes like the Bombay Police Act, the Delhi Police Act, the Habitual Offenders Act, etc. and examine whether the preventing machinery is effective in preventive offences.

2.. Critically examine the role of the Executive Magistrate in maintaining law and order. Consider the role assigned to the police in this respect.

3. Consider whether it is good if we confer the jurisdiction under Sections 107, 108, 109 and no on the judicial Magistrate.

4. Critically examine whether smoking at public places could be prohibited under the provisions of the CrPC. Refer to *K. Ramakrisbnan* v. *State of Kerala,* AIR 1999 Ker 385.

5. Critically examine how far the courts could command to their aid the provisions under Chapter X CrPC in preventing environmental pollution.

Chapter 29

PROCEEDINGS FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

1. Analyse the provisions in the Muslim Women (Protection of Rights on Divorce) Act, 1986, Sections 125, 127 CrPC and the case law* produced by various High Courts. Formulate your view'$ as to the intention of the legislature. Examine whether this Act works out injustice as made out by its critics. interrogate the provisions in human rights perspective.

2. Consider the interpretation given to the phrase "legally wedded". Examine whether it is a vehicle to bring in personal law in determining the social responsibility of husbands.

3. Collect the details of maintenance cases in the Family Court of your District, if any, and examine whether there is improvement in protecting the rights of women.

4. Review the provisions enabling enforcement of order of maintenance. Consider whether the present position is satisfactory.

5. Consider the relevance of Section 127(31^7) in the light of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

6. Consider *Sirajmohmedkhan Janmohamadkban* v. *Hafizunnisa Ya&inkhan,* {1981) 4 SCC 250: 1981 SCC (Cri) 829: 1981 Cri Lj 1430. The ratio of the *Sirajmohmedkhan Janmohamadkban* case was based on the Allahabad decision in *Din Muhammad, re,* ILR (1883) 5 All *226.* Examine whether the ratio has been correctly identified and applied by the Supreme Court. Refer to 1996 Supreme Court Digest.

7. Examine *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai,* (1987) 2 SCC 278: 1987 SCC (Cri) 354: 1987 Cri Lj 977 and the comment

thereon entitled "Daughter's Duty to Maintain Parent—Supreme Court on the Path of the Son-daughter Parity" by Prof. Amita Dhanda in (1987) 29 JILI 116.

8. Read R.V. Kelkar: "Maintenance Denied to Tribal Wife", (1984) 3 SCO *j-66* and consider its jurisprudential implications.

9. Critically examine the impact of Prevention of Domestic Violence Act, 2005 on Section 125 of the Code.

10. Review the case laws applying Section 127(3)^) prior to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and examine why Section 127(3)^) failed to achieve its purpose.

Chapter **30**

MISCELLANEOUS PROVISIONS

1. Have a review of the purposes for which the jurisdiction under Section 482 is usually invoked by the High Courts.

2. Compare the jurisdiction of the High Court under Section 482 and that of the Supreme Court under Articles 32 and 136 of the Constitution.

3. Critically examine the writ jurisdiction, revisional jurisdiction and the jurisdiction under Section 482 CrPC.

4. Examine the High Court's powers in dealing with irregular proceedings.

5. Critically examine the protection of victims' rights under the Code.

6. The scheme of the CrPC seems to suggest that the High Courts should have adequate role in overseeing criminal justice administration in each State. Do you think there is erosion of this position. Review the case law and bring out the position.

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